Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

TERRY COUSIN,

Petitioner,

versus

TRANS UNION CORPORATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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71 pp

QUESTIONS PRESENTED

1. Did the Fifth Circuit violate the Seventh Amendment by sitting as a super jury and applying an unconstitutional standard of review?

2. Did the Fifth Circuit err by requiring proof of a "willful concealment or misrepresentation" in FCRA cases, conflicting with the other Circuit Courts?

3. Did the Fifth Circuit apply an unprecedented test for proof of emotional distress damages under the FCRA, in conflict with its own decisions and those of the other Circuit Courts?

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The opinion of the United States Court of Appeals for the Fifth Circuit in *Terry Cousin v. Trans Union Corporation*, 246 F.3d 359, (5th Cir. 3/21/01), is set forth in the Appendix hereto (App. 1a - 30a).

The Order Denying Defendant's Motion for Post-Trial Relief of the United States District Court for the Northern District of Mississippi, Eastern Division, in *Terry Cousin v. Trans Union Corporation*, is unreported and set forth in the Appendix hereto (App. 31a – 35a).

BASIS FOR JURISDICTION

The final judgment of the United States Court of Appeals for the Fifth Circuit reversing and rendering the decision of the United States District Court for the Northern District of Mississippi, Eastern Division, was entered on March 21, 2001.

The United States Court of Appeals for the Fifth Circuit denied Plaintiff's Petition for Rehearing on April 27, 2001. This petition for writ of certiorari is filed within ninety (90) days from that date.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment VII:
See App. 45a.

15 U.S.C. Section 1681e(b):
See App. 43a.

15 U.S.C. Section 1681g:
See App. 43a.

15 U.S.C. Section 1681h:
See App. 43a.

15 U.S.C. Section 1681n:
See App. 44a.
15 U.S.C. Section 1681o:
See App. 44a.

STATEMENT OF THE CASE

Terry Cousin's odyssey to this Court began in 1993 when an imposter (conjectured to be his brother Richie) fraudulently opened accounts in Terry's name. One of these fraudulent accounts was with GMAC; another was with BellSouth. Both of these accounts took on immortality in TU's computer database.

Despite years of written protests from Terry and his lawyers, TU continued to publish the fraudulent accounts as part of Terry's credit report. For brevity, the repeated notices of publication of false credit reports are detailed in the Chronology located in the Appendix. (App. 37a). Due to page limitations, it is not possible to itemize here the many occasions (including two federal lawsuits) upon which Terry and his lawyers told TU that the accounts were fraudulent. The Chronology lists Terry's disputes and TU's knowledge of the false information and its repeated publication of the fraudulent accounts.

At the settlement of the first lawsuit, TU promised Terry that the fraud accounts would never reappear in his credit report(P-14), knowing full well that it had no system in place that could adequately prevent a reappearance of the fraud accounts from occurring. Only eighteen months after TU's "promise", Heafner Motors, a local car dealer, denied Terry credit because of the reappearance of the fraud accounts in his otherwise pristine credit report. Tr. 88-89.

TU offered no explanation or proof at trial as to why it continued to report the fraud accounts to third parties as part of Terry's credit report. The handwriting of TU's own employee on a TU report proves that TU had actual knowledge of the fraudulent and hurtful nature of the fraud accounts. P-42. Yet, TU published one of these accounts

anyway twenty days later. P-45. The bottom line is that TU dredged up an account that it had previously deemed fraudulent, wrote "fraud" and "derog" on the report and then knowingly disseminated the false information. It is hard to imagine more direct proof of defamation and a more willful disregard for the truth.

ARGUMENT AND AUTHORITIES

1. THE RE-EXAMINATION CLAUSE OF THE SEVENTH AMENDMENT PROTECTS FROM JUDICIAL USURPATION THE FUNDAMENTAL RIGHT AND VITAL DEMOCRATIC INSTITUTION OF TRIAL BY JURY.

The Fifth Circuit stated a pretextual adherence to a standard of review under Rule 50 and Rule 59, which allows an appellate court to review the trial judge's disposition of post-trial motions. However, the Fifth Circuit's opinion reveals a *de facto* role as a fact finder, reaching factual conclusions and inferences contrary to the jury's. (We should note that the Fifth Circuit majority did not quote nor discuss the trial court's opinion on a single occasion; the Fifth Circuit improperly reviewed all the evidence, not the district court's disposition of the Rule 50 and Rule 59 motion.) Separate and aside from the Fifth Circuit's drawing evidentiary inferences in TU's favor, the majority panel decision reveals an unconstitutional usurpation of the jury's role.

The Fifth Circuit accurately summarized the conflicting evidence of both parties as to who denied credit. App. 12a-13a. Was it Heafner Motors, based on a TU credit report, or GMAC, based on an Equifax report? The evidence about who and what caused the credit denial was classic in its contradictions, the kind of evidence that juries have historically and traditionally resolved. On TU's side of the ledger, a Heafner employee testified that Heafner Motors did not lend credit for the purchase of its automobiles. Tr. 162.

On the Plaintiff's ledger was convincing impeachment evidence: 1) the GMAC letter said that Heafner was the creditor in the transaction (D-28); 2) the Retail Installment Contract listed Heafner as the creditor (P-34); 3) and, Harmon testified (and the contract verified) that had the deal gone through Heafner, as the creditor on the contract, would have assigned the loan to another entity after the sale of the car (Tr. 173). The jury resolved this issue in Terry Cousin's favor. However, the Fifth Circuit usurped the jury's role, relying solely on the cold record of a Heafner employee's contradicted testimony that Heafner had not denied Terry credit. The documentary evidence flatly contradicted the Heafner employee's testimony. If Heafner was not the creditor, what was it doing looking at Terry Cousin's credit report? The FCRA limits access to consumers' credit files to those who TU has reason to believe have a permissible purpose as a creditor. See 15 USC §1681b(3)(E).

Terry's appeal to the Fifth Circuit should have been about whether Judge Senter, who experienced firsthand the testimony and demeanor of the witnesses, abused his wide discretion in denying TU's Rule 50 and Rule 59 motion. The Constitution forbids the Fifth Circuit from usurping Cousin's Seventh Amendment right to trial by jury by submitting all the evidence to a *de novo* review by a superjury. The Fifth Circuit found that TU was negligent; the TU credit reports were admittedly inaccurate. Even if this Court agrees with the Fifth Circuit about the facts, the appropriate remedy is remittitur or remand for a new trial.

The founding generation, who fought to secure for themselves the right to trial by jury in civil cases, were so fearful that this right would be undone by federal appellate reexamination of jury findings that they included a specific prohibition of the practice in the Seventh Amendment. *Gasperini v. Center for Humanities*, 518 U.S. 415, 449 (1996)(Scalia, J., dissenting).

The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law. U.S. Const., amend. vii.

That the facts in this case were decided by an appellate panel rather than the jury might be a matter of indifference if trial by jury were simply an available procedure for the resolution of private disputes. On the contrary, this Honorable Court has repeatedly emphasized:

> Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick v. Schiedt,* 293 U.S. 474, 486 (1935), quoted in *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 501 (1959); *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry,* 494 U.S. 558 (1990).

The Seventh Amendment stands as a limitation specifically directed at the power of the federal judiciary. *See Granfinanciera, S.A. v. Nordberg,* 492 U.S. 33, 83 (1989) (White J. dissenting).

A. The Fifth Circuit's Entry of Judgment As A Matter of Law Based on *De Novo* Review of All the Evidence is Inconsistent with Fed. R. Civ. Pro. 50. The Supreme Court approved the trial court's authority to enter a directed verdict in *Parks v. Ross*, 52 U.S. (11 How.) 362 (1851) as equivalent to the demurrer. It did not violate the Seventh Amendment when there was "no evidence whatsoever" to sustain a verdict favoring the nonmovant. *Id.*

at 372-73. When there is not sufficient evidence to raise a question of fact, there is nothing for the jury to decide and submission of the case to a jury would be an empty gesture. An issue of fact on which there is no evidence becomes an issue of law. The Supreme Court insisted however, that a directed verdict was proper if there was "no evidence" on the factual issue; but not if there were "some". *Hickman v. Jones,* 76 U.S. 197, 201 (1870).

Long after trial judges were permitted to enter directed verdicts, this Honorable Court held that an appellate court could not itself enter judgment n.o.v. upon finding that a directed verdict was erroneously denied below. The Seventh Amendment entitled the appellee to a retrial by a new jury. *Slocum v. New York Life Insurance Co.*, 228 U.S. 364 (1913). This prohibition relaxed after the adoption of the Federal Rules of Civil Procedure in 1938. Thereafter, numerous courts of appeals construed Rule 50 as permitting appellate entry of judgment n.o.v. based on the insufficiency of the evidence rather than a new trial. It was not until *Neely v. Martin K. Eby Const. Co.,* 386 U.S. 317, 324 (1967) that the Supreme Court expressly approved entry of judgment n.o.v. "in appropriate cases". *Neeley* at 324.

Cases in which the nonmovant has introduced *some* evidence on a factual issue are not "appropriate" cases – even where the appellate court is convinced that a reasonable jury would deem the evidence unpersuasive or overmatched by opposing evidence. This is particularly true where the jury, trial judge and appellate court find negligent preparation of numerous inaccurate credit reports, but the appellate court finds an insufficient quantum of damages proof. In such cases, the appellate court should be limited to the options provided by Rule 50(d) – ordering a new trial or remanding to the trial court for determination of whether a remittitur under Rule 59 is warranted.

In *Neely,* the Supreme Court did not issue blanket approval for an appellate court to enter judgment as a matter of law whenever it determines that such a judgment should

have been granted below. Indeed, Justice White's opinion is carefully nuanced:

> There are, on the one hand, situations where the defendant's grounds for setting aside the jury's verdict raise questions of subject matter jurisdiction or dispositive issues of law which, if resolved in defendant's favor must necessarily terminate the litigation .... In such situations, and others like them, there can be no reason whatsoever to prevent the court of appeals from ordering dismissal of the action or the entry of judgment for the defendant.
> On the other hand, where the court of appeals sets aside the jury's verdict because the evidence was insufficient to send the case to the jury, it is not so clear that the litigation should be terminated. 386 U.S. at 326-27.
>
> Part of the Court's concern has been to protect the rights of the party whose jury verdict has been set aside on appeal and who may have had valid grounds for a new trial, some or all of which should be passed upon by the district court, rather than the court of appeals, because of the trial judge's firsthand knowledge of witnesses, testimony, and issues – because of his 'feel' for the overall case. These are very valid concerns to which the court of appeals should be constantly alert. *Id* at 325.

Less than two months after its decision in *Neely*, the Supreme Court issued a *per curiam* decision applying *Neely* which could well stand as an appropriate resolution of the instant case:

> Under these circumstances, we think the Court of Appeals erred in directing entry of judgment for respondent; the case should have been remanded to the Trial Judge, who was in the best position to pass upon the question of a new trial in light of the evidence, his charge to the jury, and the jury's verdict and interrogatory answers. *Iacurci v. Lummus Co.*, 387 U.S. 86, 88 (1967).

B. Appellate Court Entry of Judgment As A Matter of Law Based on *De Novo* Review of All the Evidence Violates the Seventh Amendment. Even allowing that Rule 50 permits an appellate court to set aside a jury verdict and enter judgment as a matter of law, a procedure that was not available at common law in 1791, the exercise of such power must not be permitted to violate the essential function of the Seventh Amendment, which is the preservation of "the common law distinction between the province of the court and that of the jury, whereby ... issues of law are to be resolved by the court and issues of fact are to be determined by the jury." *Baltimore & Carolina Line v. Redman*, 295 U.S. 654, 657 (1935).

For these reasons, the Supreme Court has been highly protective of the jury's role:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

See also McKnight, by & Through Ludwig v. Johnson Controls, 36 F.3d 1396 (8th Cir. 1994)(on motion under Rule 50 for judgment as a matter of law, courts "must not engage in a weighing or evaluation of the evidence or consider questions of credibility" in determining that no reasonable inference can sustain the verdict).

In 1996, the Supreme Court explicitly approved what appellate courts had been doing for decades, i.e., reviewing jury verdicts for excessiveness. In *Gasperini, supra,* the Supreme Court explicitly approved the practice, but within limits bounded by the Seventh Amendments. The first of the limits is great deference to the District Court-"the very nature of the problem counsels restraint...we must give the benefit of every doubt to the judgment of the trial judge". *Gasperini* at 438, 439. Secondly, the remedy for an excessive verdict is a new trial or remittatur:

> The role of the District Court is to determine whether the jury's verdict is within the confines set by state law and to determine, by reference to federal standards developed under Rule 59, *whether a new trial or remittatur should be ordered.* The court of appeals should then review the district court's determination under an abuse-of-discretion standard. *Gasperini* at 435, (citing *Browning-Ferris Industries v. Kelco Disposal*, 492 U.S. 257, at 279 (1989)).

Federal appeals judges are not at liberty under the Seventh Amendment to sit as superjurors, nor are they permitted to pore over the minutiae of a trial record to find support for the result they would have reached had they sat in the jury box. The Seventh Amendment and this Honorable Court both mandate that federal appellate jurists may review jury verdicts only indirectly, by review for abuse of discretion of the trial court's refusal to grant post-trial relief.

See generally, *Gasperini, supra.* Further, even if the reviewing court finds an abuse of discretion, the Seventh Amendment limits the appeals court to a grant of a new trial or remittitur, particularly where the elements of liability are proven and damage proof is sufficient as a matter of law. *Gasperini,* at 435. See also *Hetzel v. Prince William County,* 523 U.S. 208 (1998).

The Fifth Circuit usurped the constitutionally established role of the jury as fact finder, in blatant violation of the Seventh Amendment. The Fifth Circuit's actions are such a far departure from the accepted and usual course of judicial proceedings so as to warrant the exercise of this Court's supervisory power.

2. DID THE FIFTH CIRCUIT ERR IN REQUIRING PROOF OF A "WILLFUL CONCEALMENT OR MISREPRESENTATION" IN FCRA CASES, CONFLICTING WITH THE OTHER CIRCUIT COURTS?

A. The Fifth Circuit is the lone Circuit Court requiring a 'willful concealment or misrepresentation' to prove willfulness under the FCRA. The threat of punitive damages under § 1681n of the FCRA is the primary factor deterring erroneous reporting by the credit reporting industry. See *Yohay v. City of Alexandria Employees Credit Union,* 827 F.2d 967, 972 (4th Cir. 1987). Compensatory damages in the FCRA context are generally not extensive. *Id.* at 974. Thus, the threat of punitive damages is a principal factor in motivating the credit bureaus to comply with the FCRA.

To obtain punitive damages in an FCRA case, the plaintiff must prove a willful violation of the FCRA. 15 U.S.C. § 1681n. The Fifth Circuit stands alone in its definition of "willful" holding that a "willful misrepresentation or concealment" is necessary for a plaintiff to prevail on a claim that a defendant willfully failed to comply with the FCRA. The Fifth Circuit's definition of

willful virtually eliminates the threat of punitive damages, allowing the credit bureaus to violate the FCRA with corporate arrogance and impunity. The Fifth Circuit's definition of willfulness has gutted the FCRA, eliminating the FCRA's protection of consumers in Mississippi, Texas and Louisiana.

15 U.S.C. § 1681n(a) provides that "any person who willfully fails to comply with any requirement" of the FCRA is liable for punitive and other damages. *Cushman v. Trans Union Corp.*, 115 F.3d 220 (3rd Cir. 1997) summarized the divergence in the Circuits:

> To show willful noncompliance with the FCRA, [Cushman] must show that [TUC] "knowingly and intentionally committed an act in conscious disregard for the rights of others,' but need not show 'malice or evil motive.'" *Philbin*, 101 F.3d at 970 (quoting *Pinner*, 805 F.2d at 1263). The Fifth Circuit has held that "[o]nly defendants who have engaged in 'willful misrepresentations or concealments' have committed a willful violation and are subject to punitive damages under § 1681n." *Stevenson*, 987 F.2d at 294 (quoting *Pinner*, 805 F.2d at 1263). Other courts have allowed punitive damages in cases involving concealments or misrepresentations without necessarily limiting the availability of punitive damages to such cases. See, e.g,., *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829, 834 (8th Cir. 1976); *Collins v. Retail Credit Co.*, 410 F.Supp. 924, 931-32 (E.D. Mich. 1976).
>
> [6] Although we decline to adopt the Fifth Circuit's holding in *Stevenson*, we conclude that to justify an award of punitive damages, a defendant's actions must be on the same order

as willful concealments or misrepresentations. *Supra*, p. 226, 227.

The Second, Fourth, Sixth, and Eighth Circuits hold that a plaintiff may recover punitive damages for a willful violation where the plaintiff demonstrates that the defendant acted willfully, deliberately, or purposefully. The plaintiff must show that the defendant acted knowingly, intentionally, or in conscious disregard for the rights of others, but need not show malice or evil intent. See, *Casella*, 46 F.3d at 476 ("conscious disregard" or "deliberate and purposeful" actions"); *Yohay v. City of Alexandria Employees Credit Union, et al*, 827 F.2d 967, 972 (4th Cir. 1987) ("punitive damages may be awarded if the jury found 'that the defendant acted under circumstances amounting to willful or wanton disregard of the plaintiff's rights.'"); *Duncan v. Handmaker*, 149 F.3d 424, 429 (6th Cir. 1998) ("knowingly and willfully"); *Jones v. Federated Financial Reserve Corporation*, 144 F.3d 961 (6th Cir. 1998) (willful); *Millstone v. O'Hanlon Reports, Inc.*, 528 F.2d 829 (8th Cir. 1976); *Thornton v. Equifax*, 619 F.2d 700, 705 (8th Cir. 1980) ("malice or evil motive need not be found for [a punitive] award, but the violation must have been willful"); *Bakker*, 152 F.3d at 1013 ("'To show willful noncompliance with the FCRA, [plaintiff] must show that [defendant] knowingly and intentionally committed an act in conscious disregard for the rights of others'.")

The jury found that TU willfully violated the FCRA. R. 325. The trial court agreed, holding that TU acted in conscious disregard for Terry Cousin's rights. R. 469 The trial court stated that "the conduct of [TU] was so reprehensible, the jury was justified in making an award of punitive damages that would hopefully deter [TU] from repeating these accounts with another consumer." Id.

Despite the jury's and trial court's findings, the Fifth Circuit found no willful violation because it claimed TU did not willfully conceal or misrepresent Terry's credit report, in

direct conflict with the standard of willfulness of the other Circuit Courts.

The Fifth Circuit recognized in a footnote that Cousin alleged that Trans Union made misrepresentations to him by promising to him in a green postcard (P-5) that the fraud account would not reappear and that TU would notify Cousin if the inaccurate GMAC account was ever reinstated. (The Fifth Circuit did not mention the letter from TU's attorney that said the Bellsouth fraud account would not reappear on Cousin's file even if Bellsouth reported it again. (P-14)) TU reinserted both the GMAC and Bellsouth fraud accounts but TU did not notify Cousin; nor did TU have a system in place to give such a notification in the event of a reinsertion due to creditor re-reporting (which TU calls "verification").

Despite these misrepresentations, the Fifth Circuit held that these misrepresentations would not give rise to a 1681n claim because they were not a "misrepresentation of the consumer's own report and concealment of that report from the consumer." (App. 28a – 29a (FN 21))

Terry Cousin repeatedly notified Trans Union that the GMAC account was fraudulent. He notified TU beginning in December, 1993. Over a period of the next three and a half years, the Plaintiff sent Trans Union over ten notices concerning the GMAC and/or Bellsouth accounts, including two federal lawsuits. See the chronology. (App. 37a). In flagrant and conscious disregard for the Plaintiff's rights, and during the pendancy of the second suit, Trans Union re-reported the GMAC account twice. The last of these inaccurate reports was made after a TU supervisor looked at the file and noted that the GMAC account tradeline was fraudulent and derogatory. TU's willful behavior with respect to the Bellsouth account, the GMAC account and the fraud address would sustain a punitive damage award in all Circuits but the Fifth Circuit.

B. THERE IS A THREE WAY CONFLICT AMONG THE CIRCUITS ON THE STANDARD FOR THE PLAINTIFF TO RECOVER FOR DEFAMATION

Terry Cousin sued TU for defamation. Citing the qualified immunity of § 1681h(e) of the FCRA, the Fifth Circuit required Terry to prove malice before he could recover for defamation. The Fifth Circuit stated that "to establish defamation with malice in the present case, one must establish either that the defendant when he published the words—(1) either knew they were false, or (2) published them in reckless disregard of whether they were true or not. See, *Gulf Publishing Co. v. Lee*, 434 So.2d 687, 695 (Miss. 1983) (citing *Reaves v. Foster*, 200 So.2d 453, 458-59 (Miss. 1967)). However, §1681h(e) provides this immunity to Trans Union for a defamation claim only if the credit report at issue is provided to the consumer himself. If the credit report is provided to a third party rather than the consumer, mere negligence is sufficient to establish a defamation cause of action; no malice or willful intent is needed. 15 U.S.C. § 1681h(e). Several of the credit reports at issue in this case were provided to third parties and thus the plaintiff need not show malice or willful intent to recover for defamation.

The Fifth Circuit misconstrued § 1681h(e) by applying its qualified immunity to all credit reports, not just credit reports provided to the consumer. The qualified immunity for defamation and other state law claims is only applicable to actions based on credit reports disclosed pursuant to §§ 1681g, 1681h, or 1681m. All of these sections listed in § 1681h(e) refer only to credit reports provided directly to the consumer. Thus, credit reports provided to third parties, such as the reports TU provided to GMAC and Heafner Motors, receive no special protection. No malice or willful intent is required. See *Whitesides v. Equifax*, 125 F.Supp. 2d 813, 818 (W.D. La. 2000) (holding that "1681h(e) only awards immunity for disclosures made pursuant to

1681g, 1681h, and 1681m"); *Whitesides v. Equifax*, 125 F.Supp. 2d 807, 811 (W.D. La. 2000) (holding that "§ 1681h(e) is not actually a preemption provision" but rather "it is a quid pro quo grant of protection for statutorily required disclosures" to consumers); see also *McAnly v. Middleton & Reutlinger*, 77 F.Supp. 2d 810, 814 (W.D. Ky. 1999) and *Yeager v. TRW*, 984 F.Supp. 517 (E.D. Tex. 1997).

By misapplying § 1681h(e), the Fifth Circuit raised the defamation standard beyond mere negligence to at least requiring malice. However, even if the Fifth Circuit's quoted standard for defamation in light of § 1681h(e) is correct, the Fifth Circuit strays from the uniform opinions of the other Circuit Courts when it holds in footnote 24:

> We also note that in *Thornton*, the Eight Circuit held that the standard of proof required for a claim under the exception to the qualified immunity provision of § 1681h(e) is greater than that for a willful violation claim under § 1681n. *Thornton*, 619 F.2d at 705. Assuming that were the case, we would have to find against the defamation with malice claim in light of our previous determination that there was no legally sufficient evidence to support a willfulness violation under § 1681n.

The Fifth Circuit's standard of proof for a willful violation under § 1681n enunciated in footnote 24 is much greater than the other Circuits standard of proof requiring a malicious defamation. Therefore, when the Fifth Circuit holds that it cannot allow a defamation claim to proceed unless it would allow a willful claim to proceed, it is applying a greater standard than did the Eighth Circuit in *Thornton* or any other Circuit Courts which require only a malicious defamation. By so holding, the Fifth Circuit is engrafting onto the qualified immunity for defamation and other state law claims an additional requirement that there must have

been a willful misrepresentation or willful concealment of the Plaintiff's credit report. This is contrary to the plain language of § 1681h(e). This is contrary to the standard of the other Circuit Courts, i.e., that defamation with malice can be established when the defendant published words known to be false or with reckless disregard of whether they were true. See e.g. Thornton v. Equifax, 619 F.2d 700, 703 (8th Cir. 1980).

TU knew both the Bellsouth and GMAC tradelines were false, yet it published them anyway. TU went to great lengths to publish the GMAC fraud act by uncloaking it specifically to display it on the next TU report. A TU supervisor decided to report the known fraudulent GMAC account, meeting the qualified immunity malice definition of Thornton v. Equifax and other Circuits. See Cushman, supra, (3rd Cir.).

This Honorable Court's intervention is needed to resolve the divergent positions regarding this important section of the FCRA. The language of § 1681h(e) and the *Whitesides* line of cases require a showing of malice or willful intent to prove defamation only in claims based on statutorily required disclosures to consumers. The *Thornton* line of cases requires a showing of malice or willful intent in all defamation cases against the credit bureaus. Finally, the Fifth Circuit requires a preliminary showing of a willful concealment or a willful misrepresentation before it will even consider a defamation claim, despite the fact that willful concealments and misrepresentation generally have nothing to do with the elements of a defamation claim.

This three-way quagmire of qualified immunity standards can best be resolved by this Court. The proper interpretation is found in the plain language of § 1681h(e) – a showing of malice or willful intent to injury is only necessary if the credit report is disclosed directly to the consumer; otherwise, a defamation claim can be established without a showing of malice or willful intent to injure. Without intervention by this Court, the protection of consumers

intended by Congress in enacting the FCRA may never be realized.

3. THE FIFTH CIRCUIT STANDS ALONE IN ITS REQUIREMENT THAT EMOTIONAL DISTRESS BE PROVEN BY CORROBORATING EVIDENCE

The Fifth Circuit now requires, as a prerequisite to recovery of actual damages in an FCRA case, that a plaintiff prove his emotional distress by corroborating witnesses or through expert testimony. In this new requirement, the Fifth Circuit stands alone.

Terry Cousin testified eloquently at trial about the tribulations caused by TU's defamations and FCRA violations. Tr. 91-94, 99-101. The jury saw all the letters he and his lawyers had written to TU about the Bellsouth and GMAC accounts. See the chronology (App. 37a). The jury saw evidence of his first lawsuit against TU in which he gave notice about the GMAC account. The jury heard Cousin testify that he felt as if he were trapped in a maze or in jail, wrongfully accused and that no one would listen to him. Tr. 92, 94. The jurors heard him say that he did not even know how many times he had to take off work to address his credit report problems. Terry's father testified that Terry has lost weight and that he had suffered immensely as a result of his long ordeal with TU. Tr. 158-159. Even though corroboration is not an appropriate evidentiary requirement for mental distress recoverable under the FCRA, Terry Cousin produced ample corroborating proof at trial through the testimony of his father that he had suffered from TU's inaccurate credit reports.

Although the Plaintiff's father corroborated Cousin's suffering, the Fifth Circuit ignored this testimony and applied a newly enunciated standard, i.e., that FCRA plaintiffs must prove their emotional damages by corroborating witnesses or through expert medical testimony. Until this decision, the

Fifth Circuit had uniformly followed a rule identical to that applied in the other Circuits, i.e., that a plaintiff's testimony of his subjective suffering was sufficient for recovery of actual damages under the FCRA. The Fifth Circuit's decision departs from its precedent and establishes a rule different from all the other Circuits.

A. Fifth Circuit's Precedent. Since 1982 the Fifth Circuit has followed the rule that FCRA plaintiffs may recover for humiliation and mental distress supported only by the plaintiff's testimony about his subjective suffering. *Thompson v. San Antonio Retail Merchants*, 682 F.2d 509 (5th Cir. 1982). The Fifth Circuit followed this rule in *Pinner v. Schmidt*, 805 F.2d 1258 (5th Cir.La. 1986). In *Pinner*, the Fifth Circuit remitted a jury award of $100,000 compensatory damages to $25,000. There was no evidence to show that Pinner suffered any out-of-pocket expenses. This Court said:

> Pinner testified that he was embarrassed and humiliated about the credit denials from several retail stores. This should support *an award of some damages. Pinner* at 1265 (emphasis added).

There was no corroborating testimony nor medical expert testimony supporting Pinner's or Thompson's damage proof.

The Fifth Circuit again followed its own precedent in *Stevenson v. TRW*, 987 F.2d 288 (5th Cir. 1993). In *Stevenson*, the plaintiff testified that he had suffered mental anguish over his lengthy dealings with TRW, that it was a "terrific shock" to him to discover his bad credit rating and that he had suffered "considerable embarrassment" from having to deal with the TRW credit problems. Finally, Stevenson said he spent a considerable amount of time trying to resolve his problems with TRW. The Court affirmed the

District Court's award of $30,000 in mental distress damages. Once again, the Fifth Circuit did not require the Plaintiff to corroborate his damages with testimony from lay or expert witnesses. In *Stevenson*, the Fifth Circuit cited with approval similar holdings from several other district courts and the Eighth Circuit. See *Stevenson* at 297.

B. Second Circuit. See *Casella v. Equifax Credit Info. Servs.*, 56 F.3d 469 (2nd Cir. 1995). In *Casella*, the Second Circuit recognized that actual damages may include humiliation and mental distress even in the absence of out-of-pocket expenses. *Casella* at 474.

C. Third Circuit. See *Philbin v. Trans Union*, 101 F.3d 957 (3rd Cir. 1996). In *Philbin*, the District Court granted summary judgment and plaintiff appealed. The Third Circuit reversed and held that plaintiff's interrogatory answers that he sustained damages over the past four or five years because of consistent and continued rejection from credit agencies because of false information contained in his credit reports were sufficient to defeat summary judgment. Philbin also said that he suffered humiliation and embarrassment. The Third Circuit approved this as a sufficient statement of damages: "Given the amorphous nature of the damages at issue, we do not consider it necessary that Philbin state his damages with any greater degree of particularity". *Philbin* at 963. The Third Circuit also noted that neither TRW nor TU contested that Philbin's emotional distress damages are cognizable. *Philbin* at 963, note 3.

D. Sixth Circuit. See *Bryant v. TRW*, 689 F.2d 72 (6th Cir. 1982)(plaintiff's testimony as to his embarrassment, anxiety, humiliation and emotional distress sufficient to support an $8,000 verdict; no corroboration nor expert testimony required).

E. Eighth Circuit. See *Bakker v. McKinnon*, 152 F.3d 1007 (8th Cir.1998) (plaintiffs' testimony sufficient to support award of $500 in compensatory damages for

emotional distress; no testimony of corroboration or experts required).

F. Ninth Circuit. See *Guimond v. Trans Union*, 45 F.3d 1329 (9th Cir.1995)(actual damages under FCRA include recovery for emotional distress and humiliation; no corroboration or expert testimony required to defeat summary judgment).

The quantum of proof required to prove emotional damages touches upon virtually every FCRA action. Every plaintiff is entitled to know the amount of proof needed to avoid dismissal before undertaking the cost of litigation. Before the Fifth Circuit's decision, there was no doubt as to the proper method to prove emotional damages. Now, this important part of the FCRA scheme is unclear. This Court should resolve this issue, allowing aggrieved consumers to confidently bring their claims by knowing the burden of proof required of them.

CONCLUSION

The Seventh Amendment was written to protect against tyranny of the elite, to repose with the citizenry the authority and responsibility as trier of fact. When an appellate court usurps the jury's rightful role, we descend from the rule of law toward the rule of man. This descent is assured when, on appeal, the reviewing court departs from its own precedent, fashions defenses not raised before the trial court and ignores compelling evidence to reach a result consistent with a verdict which the panel majority would have rendered as jurors.

The Fifth Circuit has rewritten the FCRA, requiring standards of proof never contemplated by Congress. The Fifth Circuit redefines a willful violation as requiring willful concealments and misrepresentation of the plaintiff's credit report. The Fifth Circuit requires a willful concealment or misrepresentation to prove state law defamation. The Fifth Circuit also requires corroborating or expert evidence to prove emotional distress under the FCRA, a requirement in

conflict with the other Circuit Courts. These issues cry out for this Court's intervention to re-establish the FCRA's protection of consumers.

Plaintiff Terry O. Cousin respectfully requests that this Honorable Court issue a writ of *certiorari* to review the decision of the United States Court of Appeals for the Fifth Circuit and, ultimately, to reverse the decision of the United States Court of Appeals for the Fifth Circuit and reinstate the jury's verdict in favor of the Plaintiff.

Respectfully submitted,

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(any footnotes trail end of each document)
No. 99-60429

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TERRY COUSIN,
Plaintiff-Appellee,

VERSUS

TRANS UNION CORPORATION,
Defendant-Appellant.

March 21, 2001, Decided

COUNSEL:
For TERRY COUSIN, Plaintiff - Appellee: Michael Talmadge Lewis, Pauline Shuler Lewis, Christopher Ethan Kittell, Lewis & Lewis, Clarksdale, MS.

TRANS UNION CORPORATION, Defendant - Appellant: Bruce S Luckman, Mark E Kogan, Marion, Satzberg, Trichon, Kogan & Wertheimer, Philadelphia, PA.

AMERICAN ASSOCIATION OF RETIRED PERSONS, Amicus Curiae: Deborah M Zuckerman, Stacy Jane Canan, AARP Foundation, Washington, DC.

AMERICAN ASSOCIATION OF RETIRED PERSONS, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, THE NATIONAL CONSUMER LAW CENTER, U S PUBLIC INTEREST RESEARCH GROUP, Amicus Curiae: James B Fishman, Fishman, Neil & Armentrout, LLP, New York, NY.

JUDGES:

Before GARWOOD, DeMOSS, and PARKER, Circuit Judges. ROBERT M. PARKER, Circuit Judge, dissenting.

OPINIONBY:
DeMOSS

OPINION:

DeMOSS, Circuit Judge:

Defendant-Appellant Trans Union Corporation ("Trans Union") appeals, after a jury trial, a final judgment awarding Plaintiff-Appellee Terry Cousin ("Cousin") $ 50,000 in compensatory damages and $ 4,470,000 in punitive damages for violating the Fair Credit Reporting Act ("FCRA"), *15 U.S.C. § § 1681*-1681u, n1 and for defaming Cousin with malice. Because no reasonable jury could have found that Trans Union acted willfully or with malice and because there was insufficient evidence of actual damages, we vacate the district court's judgment and render in favor of Trans Union.

I. BACKGROUND

Cousin lives in Clarksdale, Mississippi, with his wife and two teenage daughters, and has worked at the Mississippi Department of Health for 19 years. He has apparently maintained a flawless credit history except for certain items resulting from the fraudulent acts of others posing as Cousin.

In 1984, Cousin's brother Richie misappropriated Cousin's personal identifying information, i.e., his name and social security number, to obtain automobile loans from two different lenders, NBC Bank of Mississippi ("NBC") and City Finance of Okolona ("City Finance"). When Richie failed to pay, the delinquencies were negatively noted on Cousin's file with Trans Union, a consumer reporting agency as defined by the FCRA.

In 1993, Richie again pretended to be Cousin and applied for credit to purchase an automobile in Aberdeen, Mississippi, a place where Cousin has never lived. To purchase the automobile, Richie gave a down payment check that later bounced. The dealer contacted Cousin, who explained that his brother was an impostor. Nevertheless, General Motors Acceptance Corporation ("GMAC"), the apparent lender on that automobile loan, forwarded negative information about Cousin to Trans Union.

On December 6, 1993, Trans Union sent a consumer report to Cousin containing the adverse information about the GMAC account or tradeline. The consumer report also contained negative information about the NBC account and another account with American General and listed a fraudulent Aberdeen address. Cousin immediately informed GMAC of the error, and on December 10, 1993, Cousin filled out Trans Union's Investigation Request Form ("IRF") and requested Trans Union to delete all the fraudulent information. On January 11, 1994, Trans Union responded by sending Cousin a partially corrected consumer report. The GMAC account and the Aberdeen address were deleted, but the consumer report still contained the NBC and American General accounts. Attached to the consumer report was a green postcard that said:

In response to your recent request, we have reinvestigated disputed information contained on your credit file. The enclosed file reflects the results of our investigation. Some information which was disputed may have been changed or deleted due to the creditor's failure to adequately respond to our verification requests. If the creditor satisfactorily verifies this information in the future, it may be reinstated to the credit file. In the event Trans Union reinstates information to your report as a result of credit grantor verification, you will be notified in writing and you will receive an updated copy of your Trans Union report reflecting the reinstatement.

In May 1994, however, Cousin sued Trans Union for its continued reporting of the NBC and American General accounts. n2 That lawsuit was settled in January 1995, and Trans Union agreed to suppress all the adverse information about NBC and American General.

To suppress the improperly adverse information, Trans Union implemented a procedure called cloaking. Normally, when information reported to Trans Union is found to be inaccurate after reinvestigation pursuant to § 1681i, it is deleted. But unless the credit grantor involved also deletes the information from its monthly computer tape submission, n3 the information will be re-reported into the consumer's Trans Union file. To avert such errors, Trans Union designed a procedure called cloaking. The cloak is a flag in Trans Union's computer system associated with the subject account. The cloaking flag prevents the deleted information from reappearing in a consumer's file even if the credit grantor fails to remove the inaccurate information from its magnetic tapes and resubmits the information. The cloaking flag remains in effect until the credit grantor has deleted the inaccurate information from its tape submissions for twelve consecutive months. At that point, Trans Union believes that the credit grantor has deleted the information permanently, and the cloaking flag expires automatically.

On February 6, 1995, three weeks after settling the first lawsuit, Trans Union sent a consumer report to Cousin, which still contained the fraudulent NBC and American General accounts and the Aberdeen address. Furthermore, that consumer report for the first time listed a fraudulent BellSouth Mobility ("BellSouth") account. Richie had apparently opened an account in Cousin's name with BellSouth for cellular phone service in mid-1994.

On February 17, 1995, Cousin completed another IRF, again contesting the NBC and American General accounts

and the Aberdeen address. In addition, he challenged for the first time the BellSouth account. On February 28, 1995, Trans Union forwarded another consumer report to Cousin, but it still retained all of the false information. After further communication between Cousin's lawyers and Trans Union, a clean consumer report was furnished to Cousin on March 9, 1995. Moreover, the BellSouth account was cloaked as of that date. n4

On November 15, 1996, Cousin went to Heafner Motors ("Heafner") to buy a vehicle. After reaching agreement on price and other details, Cousin sought credit to purchase the vehicle. The salesman filled out the paperwork and submitted it to the credit manager Bill Harmon.

At trial, Harmon testified that Heafner does not lend any credit. n5 Instead, he stated that Heafner obtains consumer reports on customers to select the best financing match among a group of lenders. Heafner obtained a consumer report on Cousin from Trans Union, which again included the old BellSouth account. The consumer report listed the account as a "P and L write off" and showed it to have a "N09" rating, the worst rating a consumer can receive and which means "bad debt" or "charged off account." Heafner selected GMAC to provide financing for Cousin's purchase and sent his application, but not Trans Union's consumer report, to it.

Like Heafner, GMAC sought a consumer report and obtained one from Equifax. The Equifax report also contained the BellSouth account. GMAC denied in writing Cousin's application for credit to purchase the car from Heafner. GMAC based its denial on two items: 1) the Equifax report containing the BellSouth account and 2) GMAC's own internal record of the loss on the prior GMAC account, which neither the Equifax or Trans Union reports listed.

Cousin called Heafner later in the afternoon of November 15, 1996, and was told that his application had not been approved. On December 11, 1996, Cousin requested disclosure of his file from Equifax. Before releasing the file to Cousin,Equifax deleted the BellSouth account from the file, thus making Cousin unaware of the BellSouth problem.

On January 13, 1997, Cousin requested a consumer report from Trans Union. Upon receipt, he noticed that the report included the false Aberdeen address and the BellSouth account. n6 As a result, Cousin sent to Trans Union another IRF on January 24, 1997, notifying it that the entries were false.

In response to Cousin's notice, Trans Union sent to Cousin another consumer report, dated February 27, 1997. That report deleted any reference to the BellSouth account, but it restated the GMAC account that had previously been deleted in January 1994. Apparently, GMAC had decided to re-report the old GMAC account after it noted that the Equifax report did not list the GMAC account. Moreover, GMAC had re-reported the old GMAC account, using a different prefix number to designate the account. On March 4, 1997, Cousin notified Trans Union about the GMAC account. n7 On March 28, 1997, Cousin sued Trans Union, alleging various claims, including 1) negligent violation of the FCRA, 2) willful violation of the FCRA, 3) defamation with malice, and 4) breach of contract. n8 Notwithstanding this lawsuit challenging its handling of the GMAC account, Trans Union sent to BellSouth a consumer report displaying the GMAC account on April 9, 1997. Thereafter, Trans Union attempted to recloak the GMAC account on April 21, 1997. It proved to be short-lived. The following day, Trans Union pulled Cousin's file off the automated system and manually examined the file, penning certain comments on the file. Moreover, it uncloaked the file. Later on May 12, 1997, Trans Union sent a consumer report to GMAC with the GMAC tradeline still on the report.

The jury trial commenced on May 11, 1998. Before submitting the case to the jury, Trans Union moved for judgment as a matter of law under Federal Rule of Civil Procedure 50. The district court granted the motion with respect to the breach of contract claim, but denied the rest of the motion. The jury returned a verdict of $ 50,000 in compensatory damages and $ 4,470,000 n9 in punitive damages.

On June 4, 1998, Trans Union again moved for judgment as a matter of law under Rule 50 and moved for a new trial under Rule 59. In the alternative, Trans Union also moved for a remittitur of the compensatory and punitive damages awards or for a new trial based upon the admission of irrelevant and prejudicial evidence and argument regarding the Heafner automobile transaction. The district court denied the motions and entered judgment. This appeal ensued.

II. DISCUSSION

On appeal, Trans Union contends that it was entitled to judgment as a matter of law with respect to Cousin's claims for negligent violation of the FCRA, willful violation of the FCRA, and defamation with malice. In the alternative, Trans Union maintains that it merits a remittitur of the compensatory and punitive damages awards or a new trial. We review those issues in turn.

A. Standard of Review

"Judgment as a matter of law is proper on an issue if 'there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.'" *Satcher v. Honda Motor Co., 52 F.3d 1311, 1316 (5th Cir. 1995)* (quoting Fed. R. Civ. P. 50(a)). When reviewing the denial of a motion for judgment as a matter of law, we will uphold a jury verdict unless the facts and inferences point so strongly and so overwhelmingly in favor of one party that reasonable

men could not arrive at any verdict to the contrary. *See id.* Furthermore, we are bound to view the evidence and all reasonable inferences in the light most favorable to the jury's determination. *See Denton v. Morgan, 136 F.3d 1038, 1044* (quoting *Rideau v. Parkem Indus. Servs., 917 F.2d 892, 897 (5th Cir. 1990)).* Although we might have reached a different conclusion if we had been the trier of fact, we are not free to reweigh the evidence or to reevaluate the credibility of witnesses. *See id.* "We must not substitute for the jury's reasonable factual inferences other inferences that we may regard as more reasonable." *Id.*

B. Negligent Noncompliance with the FCRA

Section 1681o n10 provides statutory authority for civil liability for negligent noncompliance with the FCRA. Any person who is negligent in failing to comply with a requirement of the FCRA is liable for any actual damages sustained by the consumer. *15 U.S.C. § 1681o* (a). Here, Cousin charged that Trans Union failed to meet the requirements of § 1681e(b). n11 Under that section, "whenever a consumer reporting agency prepares a consumer report, it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." *15 U.S.C. § 1681e* (b).

In the present case, Trans Union concedes the inaccuracy of its disclosures but maintains that some of those disclosures were not consumer reports and, therefore, could not have formed the basis of a § 1681e(b) claim. Moreover, it asserts that it followed reasonable procedures as a matter of law. Finally, Trans Union argues that the inaccurate information must have been published to a third party and that Cousin must have suffered a credit denial to establish a § 1681e(b) claim. n12 We review each argument in turn.

First, Trans Union maintains that there was only one consumer report in evidence, the November 15, 1996 report to Heafner. With respect to the other disclosures of January and February 1997 to Cousin himself, Trans Union submits that they were not consumer reports and, hence, could not have formed the basis for a claim under § 1681e(b), which concerns the preparation of consumer reports. n13 Trans Union contends that, by definition, a consumer report is a communication of information to a third party bearing on a consumer's eligibility for credit. Because the January and February 1997 disclosures were only to Cousin, Trans Union asserts that they cannot be consumer reports.

Trans Union further argues that the qualified immunity afforded § 1681g disclosures to consumers pursuant to § 1681h(e) necessarily distinguishes the January and February 1997 disclosures from consumer reports like the one sent to Heafner. Section 1681g pertains to the disclosure of information in a consumer's file to consumers who make a request to a consumer reporting agency. Under § 1681h(e), disclosures made pursuant to § 1681g may not be the predicate for a consumer's common law claims of defamation or negligence against a consumer reporting agency unless the disclosures contained information furnished with malice or willful intent to injure the consumer. Moreover, § 1681h(e) excludes from qualified immunity those actions commenced under § § 1681n and 1681o. Trans Union suggests that the January and February 1997 disclosures to Cousin were not consumer reports because it is illogical to make disclosures to consumers qualifiedly immune from common law torts such as negligence but still allow them to be characterized as consumer reports and, consequently, vulnerable to attack under § 1681o as the purported by-product of negligent noncompliance with § 1681e(b).

Although Trans Union's argument that the January and February disclosures were not consumer reports may be valid, especially in light of § 1681h(e), we generally do not

consider on appeal matters not presented to the trial court. *Webb v. Investacorp Inc., 89 F.3d 252, 257 n.2 (5th Cir. 1996).* Other than, 1) a general statement by Trans Union in its answer denying Cousin's characterization of his communications with Trans Union and the nature of those documents, and 2) an attempt to include a jury instruction that no credit reports were disseminated in the instant case and that all the reports admitted in evidence were file disclosures, which attempt failed and which Trans Union did not object to, Trans Union did not present any argument remotely suggesting that the January and February 1997 disclosures, or any other disclosures, were not consumer reports for purposes of a § 1681e(b) claim. Hence, we decline to address Trans Union's position that the January and February 1997 disclosures were not consumer reports.

Trans Union's second argument for reversing the district court's denial of its motion for judgment as a matter of law concerns the reasonableness of its cloaking procedure. The adequacy of the consumer reporting agency's procedures is judged according to what a reasonably prudent person would do under the circumstances. *Thompson v. San Antonio Retail Merchants Ass'n, 682 F.2d 509, 513 (5th Cir. 1982).* In the majority of cases, reasonableness is a question for the jury. *Cahlin v. General Motors Acceptance Corp., 936 F.2d 1151, 1156 (11th Cir. 1991).* Trans Union, however, maintains that its procedure should be deemed to be reasonable as a matter of law because, unlike other reported cases that concerned a consumer reporting agency's inadequate response to a known problem, it had no way to know that its cloaking system would fail. It argues that BellSouth and GMAC should have notified it before re-reporting their erroneous information about Cousin, and thus, it should not have been penalized for something others failed to do.

We disagree. "Allowing inaccurate information back onto a credit report after deleting it because it is inaccurate is negligent." *Stevenson v. TRW Inc., 987 F.2d 288, 293 (5th*

Cir. 1993). Creditors report all magnetic tape data without notice of any kind. They do not highlight any particular data in their magnetic tape submissions. Instead, it is incumbent on the consumer reporting agency to permanently delete and cloak the erroneous information. Trans Union knew about problems with re-reporting as Trans Union's own cloaking manual indicated that a process had to be developed to ensure that inaccurate information that was deleted did not keep reappearing. Trans Union offers no reason why, as a matter of law, cloaking for only twelve months is a reasonable procedure, especially when it could have easily cloaked any adverse information permanently and when its own witness conceded that in retrospect the twelve month cloaking procedure may have been unreasonable. n14 The fact that Experian, another of Trans Union's consumer reporting agency competitors, did not have a problem with ensuring the non-reappearance of, at least, the BellSouth account suggests the unreasonableness of Trans Union's procedure. Accordingly, Trans Union's cloaking procedure was not reasonable as a matter of law, and the issue of reasonableness was properly before the jury to consider.

Trans Union's final argument concerns whether the inaccurate information must have been published to a third party and that Cousin must have suffered a credit denial to establish a § 1681e(b) claim. In essence, that argument involves two interrelated legal elements--causation and injury--and charges that no injury flowed from the disclosures of the inaccurate information because they were not publicized to a third party and that Cousin suffered no injury because there was no credit denial. Referring to various cases from this and other circuits, Trans Union insists that publication and denial of credit are prerequisites to a § 1681e(b) claim. *See, e.g., Pinner v. Schmidt, 805 F.2d 1258, 1262 (5th Cir. 1986); Philbin v. Trans Union Corp., 101 F.3d 957 (3d Cir. 1996); Casella v. Equifax Credit Info. Servs., 56 F.3d 469 (2d Cir. 1995); Cahlin, 936 F.2d 1151;*

Hauser v. Equifax, Inc., 602 F.2d 811 (8th Cir. 1979). But see Guimond v. Trans Union Credit Info. Co., 45 F.3d 1329, 1333 (9th Cir. 1995) (concluding that district court erred in predicating liability under § 1681e(b) on the occurrence of a credit denial or the transmission of a report to a third party). Because the January and February 1997 disclosures were sent to Cousin, rather than a third party, and because they did not contribute to a credit denial, Trans Union contends that those disclosures cannot support Cousin's claim for negligent noncompliance with § 1681e(b). As for the consumer report sent to Heafner in November 1996, Trans Union maintains that there was no evidence indicating that Heafner utilized the report to deny credit to Cousin.

We need not address Trans Union's specific arguments as to whether publication and denial of credit are necessary to assert a § 1681e(b) claim because even assuming arguendo that denial of credit and publication are not prerequisites for a § 1681e(b) claim, we see insufficient evidence of actual damages to warrant the jury's award. As previously noted, § 1681o provides for actual damages when there has been negligent noncompliance with the FCRA. Here, the jury awarded $ 50,000 in compensatory damages and $ 4,470,000 in punitive damages. Those compensatory damages constituted the actual damages award and were apparently for Cousin's purported denial of credit by Heafner and for his emotional distress. n15 Trans Union contends that no compensatory damages should have been awarded for Cousin's failure to receive credit for the purchase of a vehicle because the credit grantor did not utilize a Trans Union credit report. It asserts that GMAC, not Heafner, denied Cousin credit and that GMAC used a report from Equifax and its own internal files. Additionally, Trans Union argues that the evidence did not support an award for Cousin's emotional distress.

Having reviewed the record, we agree. There was no legally sufficient evidence for a reasonable jury to find that a

Trans Union credit report was utilized to deny Cousin credit. Three items purportedly supported the belief that Heafner denied Cousin credit based on a Trans Union credit report. One, a letter from GMAC read:

"We were recently informed by HEAFNER MOTORS, INC. that it was considering the credit sale or lease of an automobile or other product to you and asked whether we would be prepared to accept your obligation if the transaction was completed. We must regretfully inform you that we were not agreeable to handling the proposed transaction."

Two, some testimony revealed that Heafner would have been noted as the seller/creditor on the vehicle's installment sales contract. Three, additional testimony indicated that Heafner assigns loans to other entities after the sale of a car. Although we are bound to view the evidence and all reasonable inferences in the light most favorable to the jury's determination, we cannot find that a reasonable jury would have inferred from the foregoing evidence that Heafner denied Cousin credit based on a Trans Union credit report, particularly when the unequivocal testimony from Heafner was that it does not grant credit to customers. n16 The thrust of the evidence indicated that GMAC was the credit grantor and that it denied Cousin's application based on an internal credit report and a report from Equifax, not Trans Union. As the denial of credit was due to something other than Trans Union's consumer report on Cousin, we cannot justify the $ 50,000 compensatory damages award to include damages arising from that credit denial.

Accordingly, the only possible actual damages related to Cousin's emotional distress. The evidence of that distress, however, was very limited and legally insufficient. Cousin testified that as a result of the November 15, 1996 credit denial, he felt real frustrated and irritated because the BellSouth information was being re-reported. n17 At the time

he felt emotional distress, he did not know whethera Trans Union report had been utilized by any of the parties. In light of the fact that the credit denial occurred due to an Equifax report, Cousin's emotional distress from the denial of credit cannot be attributed to Trans Union, and he cannot recover actual damages for that distress.

The only other testimony about emotional distress concerned Cousin's reaction to seeing his inaccurate Trans Union credit reports of November 15, 1996, and January 17, 1997. n18 Upon being questioned about how he felt when he saw the November 15, 1996 credit report, Cousin testified:

A: Very upset, angry. And it just was that, you know, all things I had done, the company to not - they didn't hear me. I had told them over and over again but they didn't listen to me, you know. So that's how I felt.

Q: You felt like nobody was listening?

A: Felt like nobody was listening.

As for the January 17, 1997 disclosure, Cousin stated:

A: I felt like, if you know anything about a maze, it's like being trapped inside of something that you can't get out of.

In *Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042, 1052, 55 L. Ed. 2d 252 (1978),* the Supreme Court required proof of actual injury for compensatory damages to be awarded for mental or emotional distress in an action brought under *42 U.S.C. § 1983.* It concluded that a jury's award for emotional distress must be supported by evidence of genuine injury, such as the evidence of the injured party's conduct and the observations of others. *Id.* at n.20. We extended *Carey*'s holding and reasoning to other cases involving federal claims

for emotional harm in *Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 938 (5th Cir. 1996),* a case concerning claims for racial discrimination and retaliatory discharge. There, we recognized that to establish intangible loss, *Carey* requires "a degree of specificity which may include corroborating testimony or medical or psychological evidence in support of the damage award. *Id. at 940.* In *Patterson*, we were confronted with the following evidence of emotional distress by one of the plaintiffs.

He testified that he felt "frustrated" and "real bad" for being judged by the color of his skin. He explained that the work environment was "unbearable" and was "tearing his self-esteem down." He also stated that it "hurt" and made him "angry" and "paranoid" to know that his supervisor referred to him as a "porch monkey" or a "nigger" and generally though that he was inferior to white employees.

Id. at 939. That plaintiff's testimony was much more concrete than Cousin's; yet, we vacated the district court's $ 40,000 emotional distress award, finding that his testimony of mental distress was insufficient. *Id.* Because Cousin presented no more than what was offered in *Patterson*, we likewise vacate the award for emotional distress in the present case for insufficient evidence of actual damages. n19

C. Willful Noncompliance with the FCRA

Section 1681n n20 provides the statutory authority for civil liability for willful noncompliance with the FCRA. As with his negligent noncompliance claim, Cousin's willful noncompliance claim pertains to Trans Union's failure to meet the requirements of § 1681e(b). Under the willful noncompliance statute, a consumer may obtain punitive damages. *See 15 U.S.C. § 1681n* (a)(2). Here, the jury awarded $ 4,470,000 in punitive damages.

"Malice or evil motive need not be established for a punitive damages award, but the violation must have been willful." *Fischl v. General Motors Acceptance Corp., 708 F.2d 143, 151 (5th Cir. 1983).* In *Pinner*, we noted that "willful" is a word of many meanings and that its construction is often influenced by its context. *See Pinner, 805 F.2d at 1263.* In concluding that the consumer reporting agency in that case did not commit a willful violation, we remarked that there was no evidence suggesting that the agency "knowingly and intentionally committed an act in conscious disregard for the rights of others." *Id.*; *see also Philbin, 101 F.3d at 970; Stevenson, 987 F.2d at 293.* Generally, courts have allowed a willful noncompliance claim to proceed where a defendant's conduct involves willful misrepresentations or concealments. *See Pinner, 805 F.2d at 1263.* In those cases, a consumer reporting agency has typically misrepresented or concealed some or all of a credit report from a consumer. *See id.* (discussing *Millstone v. O'Hanlon Reports, Inc., 528 F.2d 829 (8th Cir. 1976)); see also Stevenson, 987 F.2d at 294.*

In its initial brief, Trans Union asserts two bases for rejecting Cousin's § 1681n claim. First, it argues that Cousin's § 1681n claim depended heavily on allegations that Trans Union willfully reinserted the GMAC tradeline into Cousin's consumer report in early 1997 and that judicial estoppel should have barred that claim from being asserted. Second, Trans Union maintains that Cousin failed to present sufficient evidence of willfulness, comparing the instant situation to various other decisions involving far more egregious facts that were held insufficient to state a claim under § 1681n.

We need not address the first of Trans Union's arguments as Cousin essentially concedes in his response brief that Trans Union did not willfully dredge up the GMAC tradeline and reinsert it into Cousin's consumer report. Notwithstanding this apparent concession, Cousin challenges

Trans Union's second argument that he failed to present sufficient evidence of willfulness. Cousin points to several facts, which apparently were brought forth at trial, to establish that Trans Union's actions constituted willful noncompliance. First, Cousin refers to the re-reporting of the BellSouth account in the November 15, 1996 report to Heafner despite the prior cloaking and the December 1995 notice from BellSouth to Trans Union confirming that the BellSouth information was subscription fraud. Second, Cousin argues that Trans Union knew about the problems of re-reporting but failed to do anything about it. He maintains that the company failed to adequately assess whether a twelve-month cloaking system would work. Third, Cousin complains of Trans Union's transmittal to BellSouth on April 9, 1997, a report including the fraudulent GMAC tradeline. Finally, Cousin raises the uncloaking of his consumer report on April 22, 1997, after the report had been cloaked on April 21, and its transmission to GMAC. n21 In its reply to Cousin's brief, Trans Union attempts to address Cousin's counter-arguments. n22

At trial, Cousin introduced evidence that the BellSouth tradeline was fraudulent and that Trans Union had cloaked the account in March 1995. Additional evidence indicated that in December 1995, BellSouth had submitted to Trans Union a UDF stating that the BellSouth account was probably subscription fraud. Eleven months later, the BellSouth tradeline reappeared in Cousin's file. Testimony indicated that BellSouth may have re-reported the adverse tradeline information to Trans Union between April 1996 and August 1996. The prior lawsuit, the cloaking of the BellSouth account, and BellSouth's own UDF transmittal may have put Trans Union on notice about the falsity of the BellSouth account with respect to Cousin; nevertheless, we cannot conclude that such evidence is legally sufficient to establish that Trans Union willfully violated § 1681e(b). In *Philbin*, the Third Circuit found no willful violation despite the

reappearance of inaccurate information that had previously been deleted and which the consumer had again notified the consumer reporting agency about when that information reappeared. *See id.*; *see also Casella, 56 F.3d at 476* (failing to delete inaccurate information notwithstanding notification to consumer reporting agency did not rise to the level of conscious disregard or deliberate andpurposeful action necessary to make out a willful noncompliance claim). The present situation is no more egregious than in *Philbin* or *Casella*. The fact that Trans Union may have had experience with Cousin's BellSouth tradeline and that BellSouth had submitted a UDF to Trans Union about subscription fraud does not necessarily translate into knowingly and intentionally committing an act in conscious disregard of Cousin's rights. BellSouth itself appears to have reinserted the information, and several months had elapsed from the time of the UDF and/or the initial cloaking to the reinsertion of the BellSouth tradeline into Cousin's file. Finally, Trans Union did not conceal Cousin's consumer reports or misrepresent them. That in and of itself suggests that Trans Union did not commit a willful violation of § 1681e(b). *Stevenson, 987 F.2d at 294* ("Only defendants who engaged in 'willful misrepresentations or concealments' have committed a willful violation and are subject to punitive damages under § 1681n.").

Similarly, we find Cousin's argument with respect to Trans Union's failure to implement a better cloaking system unavailing. The system was not perfect, but it was effective for a few months, and Trans Union never attempted to mislead Cousin with respect to his consumer report or his rights. We may fault the failure to implement a full-proof cloaking procedure as unreasonable, but we cannot say that it was willful.

As for Trans Union's disclosure of Cousin's consumer reports to BellSouth in April 1997 and to GMAC in May 1997, we first note the evidence at trial and the parties'

admissions. When on January 17, 1997, after having been denied credit to purchase a car from Heafner, Cousin received a Trans Union report, the report included the false Aberdeen address and the BellSouth tradeline. Cousin immediately notified Trans Union that those entries were false, and Trans Union deleted them. At that time, however, GMAC submitted to Trans Union, as much of the evidence indicates and as Cousin now apparently concedes, the old GMAC tradeline that had previously been deleted from Cousin's report. But GMAC utilized a different prefix code to identify the tradeline rather than the old one. Cousin notified Trans Union about the fraudulent nature of the GMAC tradeline on March 4, 1997. That tradeline was later released in a consumer report to BellSouth on April 9, 1997. On April 21, 1997, the record reveals that Cousin's file was cloaked. That cloak was short-lived as it was uncloaked the next day. Thereafter, on May 12, 1997, Cousin's consumer report with the fraudulent GMAC tradeline was transmitted to GMAC.

Although the consumer reports to BellSouth and to GMAC contained inaccurate information about the GMAC tradeline, we do not believe that those or any other acts amount to legally sufficient evidence for a reasonable jury to find for Cousin on his § 1681n claim for violation of § 1681e(b). The GMAC tradeline had a new prefix code and, in essence, was not the same as before. We cannot deem as a willful violation Trans Union's inability to distinguish two tradelines that on their face were different. Thus, Trans Union's failure to quickly delete the GMAC tradeline and its decision to release a consumer report with that information while it reinvestigated the tradeline cannot be deemed a willful violation of § 1681e(b). *See 15 U.S.C. § 1681i* (providing reinvestigation procedure in case of disputed accuracy).

Cousin makes much of the fact that Trans Union cloaked his file on April 21 with notations stating "ID FRAUD" and "derogs" and then uncloaked the file the next day. He argues

that the uncloaking demonstrates willfulness because the evidence showed that only a Trans Union supervisor could have manually uncloaked his file. Thus, Cousin believes that Trans Union must have intended for the GMAC tradeline to be in his file. Even if a Trans Union supervisor had uncloaked Cousin's file, we conclude that such an act did not constitute a willful violation of § 1681e(b). As the testimony indicated, cloaking is a process whereby Trans Union precludes future submissions of inaccurate tradeline information from being entered into a consumer's file. Cloaking does not concern the actual deletion of any inaccurate information. Hence, when Trans Union determined to uncloak Cousin's file, it did not actually do anything substantively to his file. Rather, Trans Union allowed the status quo to stand while it reinvestigated the fraudulent nature of the GMAC tradeline. Consequently, we see no willful violation of § 1681e(b) under the] evidence presented to the jury. n23

D. Defamation With Malice

Cousin's last claim is a common law action for defamation with malice. Under § 1681h(e), consumer reporting agencies are generally qualifiedly immune from state law claims for defamation unless they involve malice or willful intent to injure. Both Trans Union and Cousin agree that courts have determined that malice under this statutory scheme is congruent with the common law standard. *See Thornton v. Equifax, 619 F.2d 700, 703 (8th Cir. 1980).* Thus, to establish defamation with malice in the present case, one must establish that the defendant when he published the words--(1) either knew they were false, or (2) published them in reckless disregard of whether they were true or not. *See Gulf Publishing Co. v. Lee, 434 So. 2d 687, 695 (Miss. 1983)* (citing *Reaves v. Foster, 200 So. 2d 453, 458-59 (Miss. 1967)).*

In the instant case, there were three disclosures to outside parties: 1) the report to Heafner Motors with the BellSouth tradeline and the fraudulent Aberdeen address on November 15, 1996; 2) the report to BellSouth with the GMAC tradeline on April 9, 1997; and 3) the report to GMAC with the GMAC tradeline on May 12, 1997. None of those disclosures amounted to defamation with malice.

As previously indicated, after learning of the fraudulent nature of the BellSouth tradeline, Trans Union had cloaked the BellSouth tradeline in March 1995. Pursuant to that procedure, that information was not reported in Cousin's file for at least a year and was not publicized to another party until November 1996. Only after BellSouth had apparently begun re-reporting that tradeline did it get back into Cousin's file. The lack of permanence with the cloaking procedure may evidence the weakness and unreasonableness of the procedure, but no malice can be derived from it.

Likewise, we see no legally sufficient evidentiary basis for concluding that Trans Union defamed with malice when it transmitted the GMAC tradeline to BellSouth and to GMAC itself. GMAC had re-reported the tradeline, utilizing a different prefix code. Although in March 1997 Cousin had notified Trans Union about the fraudulent nature of that tradeline, we cannot say that Trans Union knew that the tradeline was false when the evidence revealed that the tradeline had been re-reported with a different prefix code and that Trans Union was reinvestigating that tradeline. Trans Union's subsequent actions do not suggest a reckless disregard for the truth. It promptly corrected any errors and fully disclosed its reports to Cousin. Therefore, we find that there was legally insufficient evidence to support Cousin's defamation with malice claim. n24

III. CONCLUSION

For the foregoing reasons, we vacate the district court's judgment and render that Cousin taken nothing with respect

to his claims. n25 Each party is to bear their respective costs on appeal.

DISSENTBY:
ROBERT M. PARKER

DISSENT:

ROBERT M. PARKER, Circuit Judge, dissenting:

Because the evidence, taken in the light most favorable to the jury verdict, supports that verdict, I respectfully dissent. "Our assigned role is neither to re-try the case *de novo* nor to supplant the jury verdict so long as it is supported by substantial evidence." *Pinner v. Schmidt, 805 F.2d 1258 (5th Cir. 1986).*

I agree that with the majority that Trans Union's cloaking procedure cannot be held reasonable as a matter of law and that the issue of reasonableness was properly submitted to the jury. However, I would hold that the evidence of actual damages was sufficient to warrant the jury's award of $ 50,000. Actual damages may include out-of-pocket losses, damages for injury to reputation and creditworthiness and for humiliation or mental distress. *See Fischl v. General Motors Acceptance Corp., 708 F.2d 143, 151 (5th Cir. 1983).* Cousin and his attorney, over a four-and-one-half year period, repeatedly advised Trans Union that specific derogatory credit information in its files was inaccurate. Cousin commenced two successive federal lawsuits in an effort to obtain Trans Union's compliance with the Fair Credit Reporting Act ("FCRA"), *15 U.S.C. § § 1681*-1681u. Moreover, Cousin testified concerning his mental and emotional pain arising from the ongoing struggle. The jury's conclusion that Cousin suffered actual financial and emotional damages was entirely reasonable in light of the evidence presented at trial.

Further, I conclude that the evidence supports the jury's punitive damage award of one percent of Trans Union's net worth. Cousin presented evidence of Trans Union's willful noncompliance with *15 U.S.C. § 1681e* (b)'s requirement that a credit reporting agency shall follow reasonable procedures to assure maximum possible accuracy of credit information. Again, the majority does not find as a matter of law that Trans Union complied with the reasonableness requirement of FCRA. Rather, it reverses the jury verdict on the basis that the evidence was insufficient for the jury to conclude that its noncompliance was willful. I disagree. At the heart of our inquiry lies Trans Union's policy of limiting its cloaking of erroneous information to one year. The evidence was more than sufficient for a jury to conclude that Trans Union was aware that one-year cloaking limit was inadequate, and that it could have addressed the problem by implementing permanent cloaking procedures. Further, Trans Union knew, after years of repeated complaints and a prior lawsuit, that Cousin's file had been the target of "ID FRAUD," yet the majority holds that a reasonable juror could not conclude that the decision to uncloak the file and release a consumer report while it reinvestigated yet another complaint was a willful violation of its duty to behave reasonably. In short, both Trans Union's general cloaking policy and its specific handling of Cousin's file support the jury's finding of willful noncompliance.

Based on the foregoing, I would affirm the verdict for Cousin *in toto*.

n1 The FCRA is one of seven independent subchapters of the Consumer Credit Protection Act, *15 U.S.C. § § 1601-*1693r.

n2 Cousin also sued Jerry Enis Motors and Equifax, Inc. ("Equifax"), another major consumer reporting agency, for failing to reinvestigate and delete information about the GMAC account.

n3 Credit grantors regularly send to Trans Union magnetic tape data that updates the credit history of their consumers. The update is usually monthly.

n4 BellSouth also notified Trans Union via a Universal Data Form ("UDF") on December 15, 1995, that the BellSouth account was subscription fraud.

n5 The retail installment contract, however, would have listed Heafner as the seller/creditor.

n6 This was the first time that Cousin realized that the BellSouth account had been reinserted. Trans Union did not notify him before the information was reinserted.

n7 As with the BellSouth account, Trans Union did not notify Cousin before reinsertion of the GMAC account.

n8 Cousin also filed suits against several other defendants. On March 20, 1997, Cousin sued BellSouth, alleging that it "willfully and maliciously and in a secretive manner not reasonably discoverable by plaintiff published the false and libelous Bellsouth tradeline to Trans Union." Furthermore, on April 7, 1997, Cousin commenced an action against GMAC for re-reporting the GMAC account. In addition, he filed suits against Equifax and Memphis Consumer Credit, an Equifax affiliate, for negligently reporting the inaccurate BellSouth account to GMAC on November 15, 1996.

N9 This represented one percent of Trans Union's net worth.

n10 That section provides in pertinent part:

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of-
(1) any actual damages sustained by the consumer as a result of the failure;
(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.
15 U.S.C. § 1681o (a).

n11 In his response brief, Cousin mentions a § 1681i claim. Under that section, a consumer reporting agency after reinvestigation must promptly delete from a consumer's file inaccurate, incomplete, or unverifiable information that a consumer disputes. *15 U.S.C. § 1681i* (a)(5)(A). Although Cousin's complaint and the pre-trial order averred general claims of negligent and willful violations of the FCRA, neither specifically stated § 1681i nor did the jury instructions present a claim for violating § 1681i. Because the record does not establish that a § 1681i claim was ever presented to the jury, we focus solely on the claims seeking redress for noncompliance with § 1681e(b).

n12 Trans Union seems to vacillate as to whether a credit denial is necessary for a § 1681e(b) claim. At the district court, Trans Union stated on one occasion that a credit denial may not be a prerequisite. But it then argued that without a denial, Cousin could not establish any causation between Trans Union's alleged failure to comply with § 1681e(b) and Cousin's supposed damages.

n13 In its initial brief, Trans Union argues that the report sent to Heafner and the two disclosures in January and February were the only possible "consumer reports." Interestingly, it speaks very little of its disclosures of

Cousin's file to BellSouth and to GMAC on April 9 and May 12, 1997, respectively. Only in the reply to Cousin's brief, which clearly raises those two disclosures, does Trans Union address them. Although those two disclosures were transmitted after the filing of Cousin's complaint, the pretrial order clearly included those publications, and Cousin presented evidence about them at trial. Consequently, those disclosures were a part of the trial record. *See* Fed. R. Civ. P. 16(e) (" Pretrial order shall control the subsequent course of the action unless modified by a subsequent order.").

n14 She partially retracted the statement later in the same deposition testimony that was admitted into the trial record.

n15 Actual damages may include damages for humiliation or mental distress even if the consumer has suffered no out-of-pocket losses, as well as damages for injury to reputation and creditworthiness. *Fischl v. General Motors Acceptance Corp., 708 F.2d 143, 151 (5th Cir. 1983).* No evidence about other actual damages was in the record. Cousin's attorneys did seek attorney's fees and costs, but those related to the filing of the instant action and were sought post-verdict pursuant to the attorney's fees provisions of the FCRA and the common law.

n16 The three items correspond to concerns with the Truth in Lending Act ("TILA"), *15 U.S.C. § § 1601*-1667f. That statute attempts to achieve the "informed use of credit results from an awareness of the cost thereof" by consumers by "mandating a meaningful disclosure of credit terms." *15 U.S.C. § 1601* (a). And it distinguishes between the responsibilities of creditors and assignees. *See generally Riviere v. Banner Chevrolet, Inc., 184 F.3d 457, 460-61 (5th Cir. 1999).* Under the TILA, "if an obligation is initially payable to one person, that person is the creditor *even if the obligation by its terms is simultaneously assigned to another person.*" *Id.* (quoting the staff interpretation to Regulation Z, 12 C.F.R. § 226). The TILA recognizes that an automobile

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dealer and a bank may create an arrangement whereby the credit sale contracts are initially payable to the dealer but are immediately assignable to the bank. *Id.* In such cases, the dealer and purchaser execute the contract only after the bank approves the creditworthiness of the purchaser; yet, the dealer is deemed to be the only creditor in the transaction. *Id.* Heafner's arrangement with GMAC correlates to the TILA model.

n17 Cousin testified:

A: On that day I felt real frustrated, real irritated to know that this information was continuing to be reported over and over again. I already told them that it was not me. I wanted to say that it was a feeling of like being in jail knowing that I - I mean, I didn't do this. I'm not guilty, but I was continuing to be punished for it.

n18 No testimony related to the February 1997 disclosure to Cousin, the April 9, 1997 disclosure to BellSouth, or the May 12, 1997 disclosure to GMAC. Accordingly, no damages award may stand based on those arguably negligent acts.

n19 Although in vacating the emotional distress award in *Patterson* we remanded the case to the district court with instructions for the district court to award nominal damages, "nominal damages to vindicate a technical right cannot be recovered unless actual loss has occurred." *Hyde v. Hibernia Nat'l Bank, 861 F.2d 446, 448 (5th Cir. 1988)* (mentioning general rule about nominal damages in context of FCRA); Restatement (Second) of Torts § 907 cmt. a (1979) ("If actual damage is necessary to the cause of action, as in negligence, nominal damages are not awarded."); W. Page Keeton et al., Prosser and Keeton on Torts § 30, at 165 (5th ed. 1984). Here, in this negligent noncompliance action, there was insufficient evidence of actual loss. Therefore, we need not award any nominal damages, and we make no

determination as to whether Cousin has satisfied all the purported elements of a negligent noncompliance with § 1681e(b) claim to warrant nominal damages.

It is true that Cousin maintained a willful noncompliance claim and a claim for defamation with malice for which nominal damages could possibly be awarded, but both fail for other reasons. *See infra* Parts C & D.

n20 That section provides in pertinent part:

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of-

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $ 100 and not more than $ 1,000; or

(B) . . .

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

15 U.S.C. § 1681n (a).

n21 Cousin also avers that Trans Union made misrepresentations to him when it sent a green postcard during the first Trans Union lawsuit in 1995, telling him that if the inaccurate information was ever reinstated after reverification, Trans Union would notify him. That allegation does not raise a § 1681n claim for violating § 1681e(b). As noted in *Pinner*, the misrepresentations that might give rise to

a willfulness claim normally concern misrepresentations of the consumer's own report and concealment of that report from the consumer. *See Pinner, 805 F.2d at 1263.* [**34]

n22 Normally, "an appellant abandons all issues not raised and argued in its *initial* brief on appeal." *Cinel v. Connick, 15 F.3d 1338, 1345 (5th Cir. 1994). But see Piney Woods Country Life School v. Shell Oil Co., 905 F.2d 840, 854 (5th Cir. 1990)* (recognizing procedural bar about raising issues in initial brief, but still addressing as an exercise of discretion some issues newly raised in reply brief). Although Trans Union's initial brief did not directly address some of the specific acts that may have formed the basis of the jury's § 1681n verdict and that Cousin discusses in his response brief, we believe that Trans Union's appeal questioning the evidentiary sufficiency of the willfulness claim sufficiently raised the issue of Trans Unions' willful conduct for us to consider all the arguments. Indeed, Cousin's brief raising all the purported willful acts is a tacit acknowledgment that the general issue of willful conduct was presented in Trans Union's brief. Furthermore, unlike the more contemptible situation where an appellant raises a completely new issue in its reply brief, disadvantaging the appellee, and for which the procedural bar concerning initial briefs was properly developed and utilized, we see no real new issue in the reply brief, but rather responsive arguments to the appellee's own contentions, and, therefore, little or no prejudice. With that in mind, we review the sufficiency of the willfulness claim.

n23 In making this ruling, we again make no determination as to whether publication and denial of credit are prerequisites for a claim predicated on § 1681e(b).

n24 We also note that in *Thornton*, the Eighth Circuit held that the standard of proof required for a claim under the exception to the qualified immunity provision of § 1681h(e) is greater than that for a willfulviolation claim under § 1681n. *Thornton, 619 F.2d at 705.* Assuming that were the

case, we would have to find against the defamation with malice claim in light of our previous determination that there was no legally sufficient evidence to support a willfulness violation under § 1681n.

n25 In light of our ruling, we do not address Trans Union's argument, in the alternative, regarding remittitur or a new trial.

NO. 1:97CV93-S

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MISSISSIPPI, EASTERN DIVISION

TERRY COUSIN,
Plaintiff,

v.

TRANS UNION CORPORATION,
Defendant.

COUNSEL:
For TERRY COUSIN, plaintiff: Michael T. Lewis, LEWIS & LEWIS, Clarksdale, MS.

For TRANS UNION CORPORATION, defendant: Danny L. Crotwell, COURTNEY & CAMP, Jackson, MS.

For TRANS UNION CORPORATION, defendant: Bruce S. Luckman, MARION, SATZBERG, TRICHON & KOGAN, P.C., Philadelphia, PA.

PETER A. GIANOPOULOS, movant, Pro se, South Attleboro, MA.

JUDGES:
L.T. Senter, Jr., SENIOR JUDGE.

OPINIONBY:
L.T. Senter, Jr.

OPINION:

ORDER DENYING DEFENDANT'S MOTION FOR POST-TRIAL RELIEF

This cause is before the court on defendant's motion for post-trial relief following a jury verdict for the plaintiff awarding $ 50,000.00 compensatory damages and $ 4,470,000.00 punitive damages. A brief recitation of the facts follows:

In 1993, Terry Cousin's brother pretended to be Terry when he applied for credit to purchase an automobile in Aberdeen, Mississippi. The check he gave for the down payment for the automobile bounced. The automobile dealer contacted the plaintiff, Terry Cousin, who explained that his brother was an impostor. Unfortunately, a "bad credit report" found its way into the Trans Union credit reporting system via information furnished by GMAC. This began a series of letters from the plaintiff to GMAC and Trans Union which temporarily eliminated the erroneous information from Trans Union's credit report, only to have it repeatedly reappear.

In 1994 another impostor opened an account in plaintiff's name with BellSouth Mobility for cellular phone service. This was also reported by Trans Union in its credit reports regarding Terry Cousin. Again, Terry Cousin and his attorney spent months and numerous letters convincing Trans Union that the BellSouth transaction was the work of an impostor, not Terry Cousin.

In spite of repeated notice of the falsity of the GMAC and BellSouth accounts and in spite of Trans Union's actual knowledge of their falsity, Trans Union repeatedly published false and damaging information about Terry Cousin's credit history. The evidence introduced at trial graphically demonstrated attempt after attempt by the plaintiff and by his attorney to have the erroneous credit information reported by Trans Union removed from the plaintiff's files. Amazingly, even after plaintiff filed a lawsuit against Trans Union which was settled in part by Trans Union's agreement to keep this

erroneous information from reappearing in Terry Cousin's file, it was there again on November 15, 1996, when Terry attempted to purchase and finance an automobile in Batesville, Mississippi. He was refused credit and could not complete the purchase of the automobile because of the false and erroneous information published by Trans Union in its credit report to the automobile dealer.

The jury heard evidence that the plaintiff had been employed by the Mississippi Department of Health for 18 years and had an impeccable credit history. They also heard of the numerous attempts he and his attorney made to correct the false information being reported by the defendant and the emotional strain, pain, and suffering endured by the plaintiff in his repeated efforts to clear his good name. Finally, the jury had the benefit of defendant's net worth statement showing the net worth of Trans Union to be $ 447,000,000.00.

The defendant's motion seeks judgment as a matter of law, or a new trial, and/or remittitur of compensatory and punitive damages. For the sake of brevity, defendant's argument is subdivided into the following components:

A. Trans Union is entitled to judgment as a matter of law on plaintiff's *15 U.S.C. § 1681o* claim alleging a negligent violation of the FCRA.

B. Trans Union is entitled to judgment as a matter of law on plaintiff's *15 U.S.C. § 1681n* claim alleging a wilful violation of FCRA.

C. Trans Union is entitled to judgment as a matter of law on plaintiff's defamation with malice claim.

D. Trans Union is entitled to a remittitur of the punitive and compensatory damages awards.

E. Trans Union is entitled to a new trial because the court erroneously allowed improper and prejudicial evidence and argument that Heafner Motors denied plaintiff credit.

Parts A, B, C, and E were thoroughly argued by counsel and ruled on by the court during the course of the trial. The court overruled these arguments by defendant during trial and continues to find that the court's rulings during trial were correct.

Part D of defendant's argument seeks a remittitur of the punitive and compensatory damages awards alleging:

1. That the compensatory damages award is not supported by the evidence and should be reduced.

2. The punitive damages award should be drastically reduced.

The jury heard evidence that for 4-1/2 years the plaintiff wrote letters and made telephone calls to Trans Union and its lawyers in an effort to keep his credit file accurate. He took time off from work, filled out forms and affidavits, interviewed with attorneys, and filed two federal suits in an effort to keep his good name and credit reputation. The plaintiff testified that this made him feel trapped as if he were caught in a maze. He also felt falsely accused as if he were jailed for another's crime, and no one would listen to him. The plaintiff's father testified that his son lost weight during this ordeal, and the evidence clearly shows that he suffered emotional damages of an intense nature for 4-1/2 years. The court clearly instructed the jury on compensatory damages, and the jury award of $ 50,000.00 was reasonable and appropriate.

Trans Union argues that the size of the punitive verdict award is "unprecedented" and seeks to have the award set aside or, in the alternative, to order a remittitur.

The size of the punitive award ($ 4,470,000) is certainly substantial. However, the conduct of the defendant in this case was so reprehensible, the jury was justified [*6] in making an award of punitive damages that would hopefully

deter Trans Union from repeating these acts with another consumer. Indeed, the jury saw fit to make the punitive award one percent (1%) of defendant's net worth which indicates considered judgment on the part of the jury.

Having heard the evidence presented, this court finds that the amount of the punitive award is justified considering the degree of reprehensibility in this case. Although the punitive award may be considered excessive when compared to the compensatory award, the ratio requirement is not an important factor in this type case. The sanctions for comparable misconduct element in punitive awards is not applicable in this case because there has never been a reported case involving a credit reporting company that acted with such callous indifference toward a consumer and whose conduct was so reprehensible.

Having carefully considered the amount of the punitive award, the court finds it is appropriate considering the egregious conduct of the defendant.

The court declines to order a remittitur of compensatory or punitive damages.

Defendant's motion for post-trial relief is hereby denied.

SO ORDERED 4th day of June, 1999.

L.T. Senter, Jr./SENIOR JUDGE

No. 99-60429

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

TERRY COUSIN,
Plaintiff-Appellee,

VERSUS

TRANS UNION CORPORATION,
Defendant-Appellant.

April 27, 2001, Filed

JUDGES:
Before GARWOOD, DeMOSS, and PARKER, Circuit Judges.

OPINIONBY:
Harold R. DeMoss, Jr.

OPINION:
ON PETITION FOR REHEARING EN BANC

PER CURIAM:

Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No Member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35), the petition for Rehearing En Banc is DENIED.
ENTERED FOR THE COURT:
Harold R. Demoss, Jr./United States Circuit Judge

	Chronology	
Date	**Event**	**Reference**
06/93	Imposter Richie opens GMAC account in Aberdeen, MS	P-2
12/06/93	TU credit report to Terry Cousin showing fraudulent American General, NBC and GMAC accounts and fraud imposter address of Aberdeen, MS	P-2
12/06/93	Terry wrote GMAC requesting GMAC not to report the account to credit bureau	P-53
12/10/93	Terry sent TU Investigation Request Form disputing the American General, NBC and GMAC fraud accounts and the fraud address	P-3
12/22/93	TU letter to Terry acknowledging receipt of his IRF and stating TU will investigate	P-4
1/11/94	TU sent credit report to Terry Cousin displaying the NBC, American General fraud accounts. TU had deleted GMAC fraud account and fraud address	P-5
1/11/94	TU sent green postcard to Terry with credit report of same date. Postcard said "in the event Trans Union reinstates information to your report as a result of a credit/grantor verification, you will be notified in writing and you will receive an updated copy of your Trans Union report reflecting the reinstatement"	P-5
5/24/94	Terry sues Trans Union over NBC, American General. In his complaint, Terry notified TU again that the GMAC account was fraudulent and that the Aberdeen address is fraudulent.	P-6
7/27/94	Terry filed amended complaint in Cousin/Trans Union I; notifying TU yet	P-7

	again that the GMAC and American General and NBC and Aberdeen address are fraudulent	
1/13/95	Terry's lawyer wrote TU's attorney sending a release which settled the case. The letter requested, "Please insure that a suppress code is placed upon the Terry Cousin file so the adverse information complained of in this lawsuit will not reappear".	P-8
2/6/95	Post-settlement TU report to Terry Cousin which contained the fraudulent American General, NBC and Bellsouth Mobility accounts, along with the fraud address. This is the first time the Bellsouth account had appeared on Terry's report.	P-9
2/28/95	TU sends credit report to Terry Cousin, still containing the fraudulent American General, NBC, Bellsouth and the fraud address. The credit report had attached with it a little green postcard which said: "In response to your recent request, we have reinvestigated disputed information contained in your credit file. The enclosed file reflects the results of our investigation". This was only about six weeks after settlement of the first lawsuit.	P-11
3/2/95	TU's lawyer wrote Terry's lawyer confirming telephone conversation. The letter stated that the American General, NBC and Bellsouth accounts are still appearing and should be removed. Also, the fraud address is still appearing and should be removed.	P-12

3/3/95	Terry's lawyer wrote TU's lawyer and asked again, "Please advise TU to suppress any further reporting of this data with respect to the American General Finance, NBC of Mississippi and Bellsouth Mobl accounts"	P-13
3/8/95	TU's lawyer wrote Terry's lawyer and said, "...If these tradelines are re-reported, they will not appear on either a file accessed by Mr. Cousin or a creditor". TU never notified Terry about the limited life of the cloak.	P-14
3/9/95	TU finally issues Terry a clean report with all fraud accounts and fraud address deleted.	P-15
5/95	Jane Slayback says this was the last date that GMAC reported the fraud account to TU. Diane Terry denied this.	Slayback dep., 16, 17, 41
9/27/95	Terry wrote Bellsouth to request it stop reporting the fraud account.	P-17
9/29/95	Terry completed Bellsouth Fraud Affidavit.	P-18
12/19/95	Bellsouth informed TU in its Universal Data Form that the Bellsouth account was "subscription fraud".	P-22
8/96	Bellsouth stopped reporting the fraud accounts to the credit bureaus. TU continued to report the tradeline after this date but "Experian would not load or display the tradeline because it has been soft deleted...."	Lee Andrew's dep., P-9, P-97-100
11/15/96	Terry goes to Heafner Motors to buy a Ford Explorer on credit.	Tr. 87,

		162
11/15/96	TU sent credit report to Heafner displaying the Bellsouth fraud account and the fraud address	P-23
11/15/96	Unknown to Terry, Bill Harmon shopped the note to GMAC and Equifax sent a credit report to GMAC displaying the Bellsouth fraud account	
11/15/96	Heafner would have used a retail installment contract which disclosed Heafner as the "creditor".	P-34; Tr. 168-170
11/15/96	Terry called Heafner Motors and was turned down for credit.	Tr. 88-89
11/29/96	GMAC letter to Terry said: "We were recently informed by Heafner Motors, Inc. that it was considering the credit sale or lease of an automobile or other product to you...."	D-28
1/97	This is the date that Diane Terry claims that GMAC rereported the GMAC fraud account to TU. Jane Slayback denied this.	Terry dep. 90; Slayback dep. 16, 17, 41
1/13/97	Terry wrote TU requesting a copy of his credit report advising that he had been denied credit by Heafner Motors.	P-27
1/17/97	TU sent Terry his credit report which displayed the Bellsouth fraud account and the fraud address.	P-28
1/24/97	Terry completed TU's investigation request form (IRF) again disputing the Bellsouth fraud account and the fraud	P-29

	address	
2/6/97	TU takes internal look at Terry's credit report and writes on the face of the report as to the Bellsouth fraud account "not hers". This is TU's admission that the account does not belong to Terry. This report also displays the GMAC fraud account but TU does not delete it.	P-30
2/27/97	TU sends credit report to Terry Cousin which had deleted the Bellsouth fraud account and the fraud address but includes yet again the GMAC fraud account.	P-31
3/27/97	TU pulled internal report, looked at the GMAC tradeline, but did not delete it.	P-35; Diane Terry dep. 97
4/4/97	Terry served TU with process in this case.	P-36
4/9/97	TU sends Terry's credit report to Bellsouth displaying the GMAC fraud account. Thus, even after being served with process in a second lawsuit, TU is willfully disseminating the GMAC tradeline which it knows for a fact to be false.	P-37; Diane Terry dep. p. 98-100
4/14/97	TU pulls internal report and sees the GMAC fraud account but does not delete it.	P-38; Diane Terry dep. 101
4/21/97	TU takes another internal look at Terry's credit report which reveals the GMAC fraud account and recloaked it.	P-41; Diane Terry dep.

		105
4/22/97	The very next day, TU pulled Terry's file internally and made handwritten notes that the GMAC account was fraudulent and derogatory. TU uncloaked the GMAC account.	P-42; P-1
5/12/97	TU published the credit report which it knew to be fraudulent and derogatory to GMAC.	P-45; Diane Terry dep. 110, 111
5/20/97	TU pulled an internal credit report on Terry Cousin, finally clear of the GMAC fraud account.	P-46
5/13/98	Jury answers special interrogatories finding that TU had maliciously defamed the plaintiff and had willfully violated the FCRA.	R. 325, 326

United States Code
TITLE 15 - COMMERCE AND TRADE
CHAPTER 41 - CONSUMER CREDIT PROTECTION
SUBCHAPTER III - CREDIT REPORTING AGENCIES

Section 1681e. Compliance procedures

(b) Accuracy of report

Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

Section 1681g. Disclosures to consumers

(a) Information on file; sources; report recipients

Every consumer reporting agency shall, upon request, and subject to section 1681h(a)(1) of this title, clearly and accurately disclose to the consumer:

(1) All information in the consumer's file at the time of the request, except that nothing in this paragraph shall be construed to require a consumer reporting agency to disclose to a consumer any information concerning credit scores or any other risk scores or predictors relating to the consumer.

Section 1681h. Conditions and form of disclosure to consumers

(e) Limitation of liability

Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation, invasion of privacy, or negligence with respect to the reporting of information against any consumer reporting agency, any user of information, or any person who furnishes information to a consumer reporting agency, based on information disclosed pursuant to section 1681g, 1681h, or 1681m of this title, or based on information disclosed by a

user of a consumer report to or for a consumer against whom the user has taken adverse action, based in whole or in part on the report (FOOTNOTE 2) except as to false information furnished with malice or willful intent to injure such consumer.

(FOOTNOTE 2) So in original. Probably should be followed by a comma.

Section 1681n. Civil liability for willful noncompliance

(a) In general

Any person who willfully fails to comply with any requirement imposed under this subchapter with respect to any consumer is liable to that consumer in an amount equal to the sum of -

(1)(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than $100 and not more than $1,000; or

(B) in the case of liability of a natural person for obtaining a consumer report under false pretenses or knowingly without a permissible purpose, actual damages sustained by the consumer as a result of the failure or $1,000, whichever is greater;

(2) such amount of punitive damages as the court may allow; and

(3) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

Section 1681o. Civil liability for negligent noncompliance

(a) In general

Any person who is negligent in failing to comply with any requirement imposed under this subchapter with respect

to any consumer is liable to that consumer in an amount equal to the sum of -

(1) any actual damages sustained by the consumer as a result of the failure;

(2) in the case of any successful action to enforce any liability under this section, the costs of the action together with reasonable attorney's fees as determined by the court.

U.S. Constitution: Seventh Amendment

Seventh Amendment - Civil Trials

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

CORRECTED COPY

No. 01-177

Supreme Court, U.S.
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In The Supreme Court of the United States

TERRY COUSIN,

Petitioner,

v.

TRANS UNION CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6

Respondent, Trans Union Corporation ("Trans Union" or "TU"), now known as Trans Union LLC, is a Delaware Limited Liability Company which has no non-wholly owned subsidiaries. All of the stock of Trans Union LLC is privately held.

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REASONS FOR DENYING THE WRIT

A. Introduction.

The analysis and standards employed by the Fifth Circuit were consistent with its own precedent, with those of other Circuits, and with those of this Court. The Fifth Circuit's decision to reverse and render is indisputably correct, and no aspect of the case merits review by this Court.

Petitioner's Seventh Amendment claim is utterly baseless. The Fifth Circuit did not engage in impermissible fact finding. Instead, the Court held that, as a matter of law, the properly admitted evidence was insufficient to sustain the verdict and exercised its authority to render judgment.[1] In addition, the supposed conflict among the Circuits wrongly posited by Petitioner on "willfulness" under the Fair Credit Reporting Act, 15 U.S.C. §1681 *et seq.*, (the "Act" or "FCRA") is nonexistent. Significantly, Petitioner does not allege and cannot establish that the evidence adduced in the District Court would satisfy the willfulness test in any Circuit. Likewise, Petitioner's assertions respecting the malice requirement for defamation claims and the immunity provisions of the Act are erroneous, and raised for the first time in the Petition. Moreover, in the Court of Appeals, Petitioner took a contrary position and conceded that the malice standard applied.

---

[1] The Court of Appeals did not reach TU's contention that the punitive damages award was constitutionally excessive. However, such claim would have been subject to *de novo* review. Cooper Industries, Inc. v. Leatherman Tool Group, Inc., -- U.S. --, 121 S.Ct. 1678, 149 L.Ed.2d 674.

Finally, the Fifth Circuit's holding that there was insufficient evidence to support any award of actual damages was entirely proper. Petitioner's alleged emotional distress claims (as the case was actually tried in the District Court) were simply not supported by the evidence. First, there was no proof that Petitioner had been refused credit by Heafner Motors for a car loan as a result of a Trans Union report. This proposition had no basis in reality. In fact, the only credit decision respecting Petitioner was made by GMAC, based on an Equifax report. Second, Petitioner's accusation, that Trans Union had "dredged up" erroneous GMAC information from its archives and maliciously reinserted it into his credit file, was false from the beginning. In the Court of Appeals, Cousin abjured the "dredge up" claim, but only after he was confronted with his contrary specific representations to other courts in litigation against Equifax and GMAC. There, Cousin asserted that GMAC had maliciously re-reported the information to TU and other credit reporting agencies.

Rightly stripped of Petitioner's unproven themes, the Fifth Circuit examined the *de minimus* record on alleged emotional damages and found it to be legally insufficient. In so doing, the Court of Appeals correctly applied principles established by this Court respecting the requirement that a plaintiff must adduce testimony of actual injury to support damages based on emotional distress. In Cousin's case, that necessary evidence was completely lacking.

B. The Judgment of the Fifth Circuit Did Not Violate Either the Seventh Amendment or Fed.R.Civ.P. 50.

1. The Fifth Circuit Did Not Improperly Decide Fact Issues

Cousin's Seventh Amendment argument turns on his meritless claim that the jury was Constitutionally entitled, and the courts are Constitutionally required, to ignore the undisputed and indisputable testimony that Heafner Motors and TU played no role whatsoever in GMAC's decision to refuse credit. The simple truth is that Heafner Motors never denied Mr. Cousin credit.

Petitioner's disingenuous query (p.3) "Was it Heafner Motors, based on a TU report, or GMAC, based on an Equifax report?" flies in the face of the evidence and common sense. The only purpose for which Heafner obtained a Trans Union report was to identify a potential lender, GMAC. GMAC made the only credit decision involved in Mr. Cousin's intended automobile purchase. GMAC acted solely on the basis of its own internal records and a report from Equifax, not Trans Union. GMAC had never even seen the Trans Union report sent to Heafner Motors.

Nothing about the foregoing is out of the ordinary, and Mr. Cousin's transaction was handled in a routine way. Automobile dealers are not credit grantors; they merely submit credit applications to lenders. Cousin's efforts to conjure Heafner Motors into the lender never had any basis in fact and depended on a distortion of various application forms used by Heafner in connection with its processing of the paperwork.

Heafner, like all automobile dealers which arrange (but do not extend) credit, is a Truth in Lending Act ("TILA"), 15 U.S.C. §1601 *et seq.* "creditor" only if the actual lender (here GMAC) grants the credit application and funds the loan. At that juncture, the dealership, at the point of sale, is the entity legally responsible for making the required TILA disclosures to the purchaser. Such TILA disclosures are implicated only after the credit grantor involved has approved the loan. The dealership simply never becomes a TILA "creditor" if the credit grantor turns down the loan application, and the dealership never becomes a credit grantor subject to the FCRA under any circumstances. *See* Riviere v. Banner Chevrolet, Inc., 184 F.3d 457 (5th Cir. 1999). In short, Heafner never became a TILA "creditor" because GMAC denied Petitioner's application. The official Federal Reserve Board staff interpretation cited in Riviere makes the distinction clear:

> The dealer and purchaser execute the contract only after the bank approves the creditworthiness of the purchaser. Because the obligation is initially payable on its face to the dealer, the dealer is the only creditor in the transaction.

Riviere, 184 F.3d at 460-1 (emphasis supplied, citation omitted).

This formulation is altogether sensible. TILA and FCRA play different roles in the consumer protection scheme. FCRA focuses on information which affects a consumer's eligibility for credit. TILA, on the other hand, insures that if a loan application is granted, the consumer obtains full disclosure of the true costs of the transaction. GMAC sent Petitioner an

adverse action notice as required by FCRA §1681m, advising him of its denial of the application and identifying Equifax as the consumer reporting agency which supplied the report. TILA was not implicated because the loan was not granted. It was error for the District Judge to admit the TILA documents into evidence and allow Cousin's arguments that the jury could infer from the TILA documents that Heafner Motors denied Cousin's application for credit.

The Fifth Circuit properly recognized this error and did not improperly usurp the jury's role.

2. The Fifth Circuit Was Entitled to Render Judgment for TU.

Cousin erroneously claims that the Fifth Circuit was not entitled under Rule 50 to reverse and render, but was limited to ordering a new trial. This argument cannot be reconciled with this Court's opinion in Weisgram v. Marley Co., 528 U.S. 440, 120 S.Ct. 1101, 145 L.Ed.2d. 958 (2000), which Cousin does not acknowledge in his Petition. In Weisgram, this Court held:

> ...Federal Rule of Civil Procedure 50 permits an appellate court to direct the entry of judgment as a matter of law when it determines that evidence was erroneously admitted at trial and that the remaining, properly admitted evidence is insufficient to constitute a submissible case. 528 U.S. at 446, 120 S.Ct. at 1116.

Nothing different occurred here.

C. The Fifth Circuit's Holding That, as a Matter of Law, the Record Was Insufficient to Sustain a Willful Violation of the FCRA Is Correct.

A fair reading of the decision of the Court of Appeals on Cousin's FCRA willfulness claim is that well-established principles determined the outcome. Different courts of appeals may use slightly different nomenclature to describe the standard of proof for FCRA willfulness, but this is not evidence of a conflict in the Circuits. In fact, the Fifth Circuit took pains to point out that Cousin's case was insufficient under Fifth Circuit precedent (Stevenson v. TRW, Inc., 987 F.2d 288 (5th Cir. 1993); Pinner v. Schmidt, 805 F.2d 1258 (5th Cir. 1991)) and those of other Circuits (Philbin v. Trans Union Corp., 101 F.3d 957 (3rd Cir. 1996); Casella v. Equifax Credit Information Systems, 56 F.3d 469 (2nd Cir. 1995), *cert. denied,* 116 S.Ct. 1452, 134 L.Ed.2d 571 (1996)).

In Stevenson, *supra*, plaintiff, a 78-year-old real estate investor, began receiving numerous phone calls from bill collectors regarding accounts that were not his responsibility. Plaintiff submitted a dispute to TRW, which began its investigation, but delayed more than three months before completing it. Even then, TRW failed to delete information, ignored credit grantor responses admitting that certain information was inaccurate, failed to delete entries for which timely responses were not received, and allowed previously deleted inaccurate information to reappear.

As a result of TRW's conduct, Stevenson suffered three credit turn-downs and was forced to make a humiliating visit to his banker to explain his predicament and seek a loan. Nevertheless, the Court rejected Stevenson's §1681n claim and

vacated the award of punitive damages. The Court held that "the record does not reveal, however, any intention to thwart consciously Stevenson's right to have inaccurate information removed promptly from his report." *Id.* at 294.

In Pinner, *supra*, the Court vacated the jury's award of punitive damages. The Court held that the consumer reporting agency had not acted willfully, even though it had failed to investigate adequately and correct inaccurate information. The Court stated:

> In each case where punitive damages have been allowed the defendant's conduct involved willful misrepresentations or concealment.
>
> * * *
>
> [Defendant's] conduct in this case in no way resembles [such] actions.... [Defendant] promptly furnished plaintiff with a copy of his credit report when he requested one. No effort was made to conceal anything....Under the plain language and legislative history of §1681n, punitive damages are appropriate only where the violation has been willful....But here there is simply nothing to even suggest that [defendant] willfully set out to do [plaintiff] harm. There is no evidence that they knowingly and intentionally committed an act in conscious disregard for the rights of others. 805 F.2d at 1263 (citations omitted).

Similarly, in Philbin, *supra*, the Court affirmed the trial court's dismissal of plaintiff's punitive damages claim on summary judgment and held:

> to show willful noncompliance with the FCRA, [a consumer] must show that defendants knowingly and intentionally committed an act in conscious disregard for the rights of others. 101 F.3d at 970.

Philbin involved the reappearance of previously deleted public record information (a tax lien that was in fact Philbin's father's, James Sr., liability). Plaintiff proved that defendant removed the tax lien "for a period of time" after his original dispute. Plaintiff further claimed that, two years later, he notified TU of the reappearance of the tax lien but that TU failed to correct his report. 101 F.3d at 970. The Court, however, held that the claim "falls short of evidence of a willful violation." *Id.*

In Casella, *supra,* the Court held that TU's reporting of information appearing on automated tape, after receiving manual instructions to delete, did not constitute conduct sufficient to establish "willful" misconduct or "conscious disregard." [2]

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[2] *See also*, Lamb v. Equifax Services, Inc., 621 S.W.2d 28, 32 (Ky.Ct.App. 1981), *cert. denied*, 456 U.S. 927, 72 L.Ed. 2d 442, 102 S.Ct. 1973 (1982), where the appellate court vacated the jury's award of $25,000 compensatory and $50,000 punitive damages, because: "The record demonstrates no reluctance on the part of Equifax to disclose to [plaintiff]." *See also*, Guimond v. Trans Union Corporation, N.D.Cal. Docket 92-0301

(continued...)

Absent Petitioner's utterly false and recanted assertion that TU "dredged up"GMAC information, Petitioner's meager proofs pale in comparison to the more extensive proofs judged insufficient in the cited cases. The Fifth Circuit expressly held that Petitioner's grounds for punitive damages failed to meet the definition of willfulness as interpreted by any Circuit:

> The present situation is no more egregious than in *Philbin* or *Casella*. The fact that Trans Union may have had experience with Cousin's BellSouth tradeline and that BellSouth had submitted a UDF to Trans Union about subscription fraud does not necessarily translate into knowingly and intentionally committing an act in conscious disregard of Cousin's rights. BellSouth itself appears to have reinserted the information, and several months had elapsed from the time of the UDF and/or the initial cloaking to the reinsertion of the BellSouth tradeline into Cousin's file. Finally, Trans Union did not conceal Cousin's consumer reports or misrepresent them. That in and of itself suggests that Trans Union did not commit a willful violation of §1681e(b). *Stevenson*, 987 F.2d at 294 ("Only defendants who engaged in 'willful misrepresentations or concealments' have committed a willful

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[2](...continued)
(April 28, 1997) (unpublished opinion), a §1681e(b) action, where the Court held that the reappearance of information in subsequent file disclosures after deletion was insufficient to justify punitive damages.

violation and are subject to punitive damages under §1681n."). 18a.

Petitioner's semantics cannot create a real conflict among the Circuits. Petitioner has failed to demonstrate that a different result would obtain under any other Circuit's interpretation of FCRA willfulness. Petitioner simply did not present evidence to support a willful FCRA violation anywhere.

Cousin's argument on the impact of §1681h(e) on his state law defamation claims is incomprehensible.[3] Setting aside the fact that the state law claim alleged was defamation with malice, this contention is raised for the first time in the Petition, and is inconsistent with the prior express position taken by Cousin in the Court of Appeals that proof of malice was required. 20a.

Defamation with malice requires proof that "defendant acted with knowledge that the statement was false, or with reckless disregard as to its truth or falsity." Gulf Publishing Co. v. Lee, 434 So.2d 687, 695 (Miss. 1983); Brewer v. Memphis Publishing Company, Inc., 626 F.2d 1238, 1247-48 (5th Cir. 1980). Assuming arguendo, that this standard is congruent with FCRA §1681h(e) malice, TU is entitled to judgment as a matter of law because Petitioner failed to present

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[3] FCRA §1681h(e) provides as follows:

Except as provided in sections 1681n and 1681o of this title, no consumer may bring any action or proceeding in the nature of defamation . . . or negligence, . . . against any consumer reporting agency, . . . except as to false information furnished with malice or willful intent to injure such consumer. (emphasis supplied)

a legally sufficient basis for the jury to find a §1681n, willful, FCRA violation. As the Eighth Circuit held,

> Section 1681h(e) provided a qualified immunity for consumer reporting agencies with an exception from such qualified immunity being made for actions pursuant to sections 1681n and 1681o.... **Such an exception was not meant to lessen the standard necessary to overcome this qualified immunity in defamation actions.** (emphasis in original, **bold** supplied)

Thornton v. Equifax, Inc., 619 F.2d 700, 703 (8th Cir.1980), *cert. denied*, 449 U.S. 835 (1980). *See also*, Bloom v. I.C. Systems, Inc., 972 F.2d 1067, 1069 (2nd Cir. 1992). Moreover, even without regard to the FCRA standard, Petitioner's claim fails under established state law principles. As the Fifth Circuit held in Brewer, *supra*, 626 F.2d at 1259-60,

> Failure to discover misstatements might show negligence but did not show actual malice; even failure to check its own files did not show that the state of mind required for actual malice was "brought home to" those responsible for publishing the [allegedly defamatory statement]. 626 F.2d at 1258, FN26.

See also, Gulf Publishing *supra*; Rhodes v. Ford Motor Credit Company, 951 F.2d 905, 907 (8th Cir. 1991).

In any event, the suggestion that §1681h(e) extends qualified immunity only to required file disclosures effectively reads out part of the section, *i.e.*, that the defamation case is

brought "...with respect to the reporting of information...." (emphasis supplied) Consumer files are not consumer reports as defined by the FCRA. 9a. "Reporting" referenced throughout the FCRA is a communication of information about a consumer to a third party which may affect the consumer's eligibility for credit. The mandatory file disclosure provisions of the FCRA are communications made solely to the consumer involved. Defamation cases require proof of publication to a third party. It would make no sense for Congress to impose a malice requirement to restrict defamation claims, but limit the application of the requirement to communications made to the consumer alone which could not be the basis of a defamation action for want of a third party publication.

D. The Fifth Circuit's Holding That, as a Matter of Law, Cousin Failed to Prove Actual Damages Is Correct.

There was no testimony as to damages connected to TU other than Cousin's awareness, based on a required TU file disclosure to him, that the BellSouth account had reappeared in his credit file. It is clear that no sustainable damage case was proved. The Court of Appeals did nothing more than hold that under those circumstances, more than just a conclusory statement of being very upset or "trapped"is required to prove actual damages. In this connection, the Court of Appeals was well informed by this Court's holding in Carey v. Piphus, 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d 252 (1978).

The Fifth Circuit, relying on Carey, properly rendered judgment on Petitioner's compensatory damages claims on the ground that Petitioner failed to establish proof of actual injury.

The requirement that a plaintiff prove actual injury is consistent with well established principles of law:

> The cardinal principle of damages in Anglo-American law is that of *compensation* for the injury caused to plaintiff by defendant's breach of duty. 435 U.S. at 254-255, 98 S.Ct. at 1048 (internal quotations and citation omitted, emphasis in original).

The Carey Court held that this maxim applied to constitutional claims under 42 U.S.C. §1983 based on violations of procedural due process:

> over the centuries the common law of torts has developed a set of rules to implement the principle that a person should be compensated fairly for injuries caused by the violation of his legal rights. These rules, defining the elements of damages and the prerequisites for their recovery, provide the appropriate starting point for the inquiry under §1983 as well. 435 U.S. at 257-258, 98 S.Ct. at 1049.

In Memphis Community School District v. Stachura, 477 U.S. 299, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986), this Court held that the prerequisites for damages under Carey applied to substantive due process violations as well:

> [Carey] does not establish a two-tiered system of constitutional rights, with substantive rights afforded greater protection than 'mere'

> procedural safeguards. We did acknowledge in Carey that 'the elements and prerequisites for recovery of damages' might vary depending on the interests protected by the constitutional right at issue.... But we emphasized that, whatever the constitutional basis for §1983 liability, such damages must always be designed 'to *compensate injuries* caused by the [constitutional] deprivation.' "

477 U.S. at 309, 106 S.Ct. at 2544 (*quoting* Carey, 435 U.S. at 264-65, 98 S.Ct. at 1052-53) (emphasis in original).

In Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927 (5th Cir.1996), *cert. denied,* 519 U.S. 1091, 117 S.Ct. 767, 136 L.Ed.2d 713 (1997), the Fifth Circuit extended the holding in Carey to employment discrimination claims. The Patterson reasoning has been followed. *See, e.g.,* Forshee v. Waterloo Industries, Inc., 178 F.3d 527, 531 (8th Cir. 1999).

Instantly, the Fifth Circuit held that "actual damages" under the FCRA required proof sufficient to meet the test in Carey. This is a natural application of this Court's analyses in Carey and Memphis. The FCRA contains no presumed

damages for a negligent violation[4] and no authority to award nominal damages for a negligent violation.[5]

The totality of Petitioner's testimony on damages consisted of a few vague sentences concerning his awareness, based on an FCRA required disclosure to him of his credit file, that BellSouth had re-reported an erroneous account which TU had previously deleted. As the Court of Appeals correctly noted, Mr. Cousin did not testify about any other disclosure or report. Although Cousin's instant Petition references trial exhibits P42 and P45,[6] not a syllable of testimony appears anywhere in the record respecting P42. As for P45, Mr. Cousin testified only as follows:

> Q. (By Mr. Lewis): Let's go to Exhibit P45. What is the date?
> A. May 12, 1997?
> Q. And do you know to whom this report was sent? Do you remember?
> A. No, I do not. (NT, p.98).

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[4] The FCRA is one of several components of the Consumer Protection Act in Title 15. In the Fair Debt Collection Practices Act, 15 U.S.C. §1691 *et seq.*, (the "FDCPA") the Congress expressly provided for presumed damages for "failure to comply" with the FDCPA. §1691e(b). Clearly, the Congress knew how to include presumed damages in Title 15 and chose not to do so in the FCRA.

[5] *See* Discussion, FN19, 27a-28a.

[6] Petitioner's ultra compressed Statement of the Case required, he asserts, by page limitation constraints, is both inaccurate and misleading. Cousin's inclusion of his lawyer-prepared chronology simply does not comport to the trial record, except insofar as it lists exhibits.

The Fifth Circuit properly rendered judgment in favor of TU because there was insufficient evidence of actual injury caused by a negligent FCRA violation by TU. There was simply no testimony by Petitioner as to damages connected to TU other than his awareness, based on a required TU file disclosure to him, that the BellSouth account had reappeared in his credit file. The Court of Appeals did nothing more than hold that under those circumstances, more than just a conclusory statement of feeling "trapped"is required to prove actual damages.

Cousin's few words of alleged distress which had any connection to TU were conclusory statements based on file disclosures mandated by the FCRA made only to Petitioner at his request. Thus, even without the holding in Carey, Petitioner could establish no entitlement to damages under the FCRA. When a consumer reporting agency makes a required disclosure, §1681g, such disclosure cannot be the basis of a claim under §1681n or §1681o. The essential element of both sections is the failure to comply with a requirement of the FCRA, *i.e.*, the failure to disclose.

Cousin's lawyers understood the difference very well and filed a separate lawsuit against Equifax based on its willful concealment of the BellSouth account. As the Court of Appeals observed, 6a, Equifax failed to disclose Cousin's full file, but rather unlawfully deleted the BellSouth account which Equifax had reported to GMAC a few weeks earlier. As a result, Cousin was unaware that BellSouth had re-reported the account until he received a full and proper disclosure from TU, as required by §1681g. Such compliance by TU cannot be the basis of FCRA liability.

CONCLUSION

For all of the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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